

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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COURT OF APPEALS, DISTRICT OF COLUMBIA

JANUARY TERM, 1925

No. 4297

209

ANDREW W. MELLON, SECRETARY OF THE TREASURY
OF THE UNITED STATES, APPELLANT

vs.

NEW YORK CENTRAL RAILROAD COMPANY, THE
MICHIGAN CENTRAL RAILROAD COMPANY, VERMONT
CENTRAL RAILWAY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

FILED FEBRUARY 25, 1925



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1925

No. 4297

ANDREW W. MELLON, SECRETARY OF THE TREASURY
OF THE UNITED STATES, APPELLANT,

VS.

NEW YORK CENTRAL RAILROAD COMPANY, THE MICHIGAN CENTRAL RAILROAD COMPANY, VERMONT CENTRAL RAILWAY, THE BOSTON AND MAINE RAILROAD, RUTLAND RAILROAD COMPANY, THE DELAWARE AND HUDSON COMPANY, GREAT NORTHERN RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, WABASH RAILWAY COMPANY, SPOKANE INTERNATIONAL RAILWAY COMPANY, AND MINNEAPOLIS, ST. PAUL, & SAULT SAINTE MARIE RAILWAY, BODIES CORPORATE, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

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a Supreme Court of the District of Columbia

NEW YORK CENTRAL RAILROAD COMPANY, THE MICHIGAN Central Railroad Company, Vermont Central Railway, The Boston and Maine Railroad, Rutland Railroad Company, The Delaware and Hudson Company, Great Northern Railroad Company, Northern Pacific Railway Company, Wabash Railway Company, Spokane International Railway Company, and Minneapolis, St. Paul & Sault Sainte Marie Railway, bodies corporate, plaintiffs

In Equity,
No. 42296

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY OF
the United States, defendant

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Bill of complaint

Filed February 29, 1924

In the Supreme Court of the District of Columbia

NEW YORK CENTRAL RAILROAD COMPANY, THE MICHIGAN Central Railroad Company, Vermont Central Railway, The Boston and Maine Railroad, Rutland Railroad Company, The Delaware and Hudson Company, Great Northern Railroad Company, Northern Pacific Railway Company, Wabash Railway Company, Spokane International Railway Company, and Minneapolis, St. Paul & Sault Sainte Marie Railway, bodies corporate, plaintiffs

In Equity,
No. 42296

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY OF
The United States, defendant

To the Supreme Court of the District of Columbia:

The bill of complaint of the New York Central Railroad Company, the Michigan Central Railroad Company, Vermont Central Railway, the Boston and Maine Railroad, the Rutland Railroad Company, the Delaware and Hudson Company, the Great Northern Railroad Company, the Northern Pacific Railway Company, the Wabash Railway Company, the Spokane International Railway Company, and the Minneapolis, St. Paul & Sault Sainte Marie Railroad Company, bodies corporate, respectfully shows:

1. Plaintiffs are corporate common carriers as follows: New York Central Railroad Company under the laws of New York and other

States; Michigan Central Railroad Company under the laws of Michigan; Vermont Central Railway under the laws of Vermont; the Boston and Maine Railroad under the laws of Maine and other States; Rutland Railroad Company under the laws of Vermont and New York; Delaware and Hudson Company under the laws of New York and Pennsylvania; the Great Northern Railway Company under the laws of Minnesota; the Northern Pacific Railway Company under the laws of Wisconsin; Wabash Railway Company under the laws of Indiana; the Spokane International Railway Company under the laws of Washington; and Minneapolis, St. Paul & Sault Sainte Marie Railway Company under the laws of Minnesota.

Plaintiffs sue in their own right and in behalf of all others similarly situated.

2. Defendant is a citizen of the State of Pennsylvania, is now residing in the District of Columbia, and is the Secretary of the Treasury of the United States, and is sued in that capacity.

3. Plaintiffs are common carrier railroads engaged in commerce and in the transportation of merchandise and freight between Canada and the United States; plaintiffs own or operate lines of railway extending from points in the Dominion of Canada to points in the United States as follows:

The New York Central Railroad Company operates trains over its said line of railway between Montreal, Canada, and Utica, New York; crossing the international border at Malone, New York, and one or more of its freight trains enter the United States at said point each day between 5 p. m. and 8 a. m. and on Sundays and holidays.

3 Michigan Central Railroad Company operates lines of railroad between Buffalo, New York, and Detroit, Michigan, extending in part through Canada and crossing the border from Canada to Detroit at Detroit, Michigan. It operates each day one or more freight trains from Canada to Michigan which enter the United States at Detroit between 5 p. m. and 8 a. m. and on Sundays and holidays. It also operates one or more freight trains from Canada to Buffalo each day, which enter the United States at Black Rock, New York, between 5 p. m. and 8 a. m. and on Sundays and holidays.

Vermont Central Railway operates one or more freight trains each day from St. Johns, Canada, to White River Junction, Vermont, and enters the United States at St. Armand, Vermont, between 5 p. m. and 8 a. m. and on Sundays and holidays.

The Boston and Maine Railroad operates one or more freight trains from Sherbrooke, Canada, to points in the United States, entering the United States at the international border at Beebe Junction. One or more of its freight trains enter the United States at said point each day between 5 p. m. and 8 a. m. and on Sundays and holidays.

Rutland Railroad Company operates freight trains between Montreal, Canada, and New York City, crossing the international border at Rouses Point, New York. One or more of said freight trains enters the United States at said point each day between 5 p. m. and 8 a. m. and on Sundays and holidays.

Delaware and Hudson Company operates freight trains from Montreal, Canada, to New York City, crossing the international border at Rouses Point, New York. One or more of said freight trains enter the United States at said point each day between 5 p. m. and 8 a. m. and on Sundays and holidays.

Great Northern Railway Company operates freight trains between Winnipeg, Canada, and St. Paul, Minnesota, crossing the international border at Noyes, Minnesota. One or more of its freight trains enter the United States at said point each day between 5 p. m. and 8 a. m. and on Sundays and holidays. It operates other freight trains from Vancouver, Canada, to Portland, Oregon, which cross the international border at White Rock, B. C., into the United States each day between 5 p. m. and 8 a. m. and on Sundays and holidays. Said Great Northern Railway Company operates one or more freight trains on many branch lines between points in Canada and points in the United States, and one or more of its freight trains enter the United States from Canada at Emerson, Haskett, West Gretna, Bannerman, Midway, Rideau, Grand Fork Junction, Bridesville, and Similkameen, Canada, at Blaine, Washington, and at other points on the international boundary line between 5 p. m. and 8 a. m. and on Sundays and holidays.

Northern Pacific Railway Company operates one or more freight trains each day over its lines of railway between points in Canada and in the United States, and said trains enter the United States at Pembina, North Dakota, and Sumas, Washington, between 5 p. m. and 8 a. m. and on Sundays and holidays.

Wabash Railway Company operates freight trains over its said line of railway between points in Canada and Buffalo, New York, crossing the international border at Black Rock, New York, and one or more of its freight trains enter the United States at said point each day between 5 p. m. and 8 a. m. and on Sundays and holidays.

Minneapolis, St. Paul, and Sault Sainte Marie Railway Company operates three lines of railway between points in Canada and in the United States and said lines enter the United States at Noyes, Minnesota, at Portal, North Dakota, and at Sault Sainte Marie, Michigan, on Sundays and holidays and each day between 5 p. m. and 8 a. m., one or more of its freight trains enter the United States at said points.

All of said freight trains above described carry and transport large quantities of freight and merchandise, some of it of a perishable nature. Said merchandise and freight constitutes an appreciable part of the imports of the United States, and constitutes a large amount of foreign commerce carried on by plaintiffs.

4. For many years the Treasury Department of the United States maintained at the points on the international border mentioned in the preceding paragraph sufficient customs inspectors and employes who were directed to and did examine the merchandise imported into the United States on the plaintiffs' freight trains at the time or immediately after the same entered the United States, whether in the day or night and whether on Sundays or holidays. The United States itself paid all said customs employes and inspectors

for their services in examining such freight and made no effort to collect any part thereof from the plaintiff or from the shippers or consignees of the said merchandise.

5. By an act of Congress known as "An act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911 (36 Statutes, 901), it was provided in section 1 thereof that upon arrival at any port in the United States of any vessel or other conveyance from a foreign place, and under such regulations as the Secretary of the Treasury might prescribe, the collector of customs, upon proper application therefor, should grant a special license to lade or unlade the cargo of any such vessel or other conveyance at night.

It was further provided in section 5 thereof that the Secretary of the Treasury should fix a reasonable rate of extra compensation for night services of inspectors and other customs employes in connection with the lading or unloading of cargo at night, which rate of compensation should not exceed an amount equal to double the rate of compensation allowed to each employee for like services rendered by day, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel or other conveyance to said collector of customs, who should pay the same to the several employes entitled thereto according to the rates fixed therefor by the Secretary of the Treasury.

6. By an act known as "An act to amend an act entitled 'An act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes, approved February 13, 1911,'" approved February 7, 1920, Congress amended section 5 of the said act of February 13, 1911, by authorizing the Secretary of the Treasury to fix a reasonable rate of extra compensation for overtime service of inspectors of customs and other employes who might be required to remain on duty between 5 p. m. and 8 a. m. or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation for the benefit of drawback or in connection with the receiving or delivery of cargo on or from the wharf or in connection with the unlading, receiving, or examination of passengers' baggage.

7. The tariff act of 1922, approved September 21, 1922, repealed the first four sections of said act of February 13, 1911, but made no change or alteration in the said act of February 7, 1920, which amended section 5 of the act of February 13, 1911, leaving said section 5 in full force and effect after the passage of said tariff act of 1922.

8. The Secretary of the Treasury has construed the said tariff act to authorize him to collect from plaintiffs extra compensation for the services of employes and inspectors of customs in examining merchandise and freight entering the United States on the freight trains of petitioners on Sundays and holidays and on any day between 5 p. m. and 8 a. m.; and the defendant, the Secretary of the Treasury, has heretofore and is now directing the collectors of customs at the many crossings aforesaid on the international border to collect from

plaintiffs extra compensation for the services of the inspectors and other customs employes employed in the examination of the merchandise and freight entering the United States at said points upon plaintiffs' trains between 5 p. m. and 8 a. m. and on Sundays and holidays.

8 Plaintiffs are advised and, therefore, aver that the said construction placed by the defendant Secretary of the Treasury upon the said tariff act of 1922, and said section 5 of the act of February 13, 1911, as amended by the act of February 7, 1920, is erroneous, unlawful, and unwarranted. Nevertheless, the defendant Secretary of the Treasury has rendered to each of these plaintiffs bills for services heretofore performed by the inspectors and employes of customs in examining merchandise and freight entering the United States as aforesaid upon their trains at night and on Sundays and holidays and has threatened plaintiffs and does now threaten them that unless said bills for extra compensation are promptly paid, and similar bills to be rendered in the future shall be promptly paid, that the defendant, the Secretary of the Treasury, will direct the collectors of customs at the points aforesaid to refuse to permit the said freight trains of plaintiffs to enter the United States between 5 p. m. and 8 a. m. and at any hours on Sundays and holidays or to proceed forthwith to their destination at interior points and will direct said inspectors of customs to refuse to examine the merchandise and freight so entering the United States at the points aforesaid until the next succeeding secular day after their entry.

9. The construction placed by said Secretary of the Treasury upon said acts of Congress is unlawful and unwarranted. His threats to refuse to examine the merchandise and freight upon plaintiffs' trains entering the United States from Canada at the points and times aforesaid, and to refuse to permit plaintiffs' trains to

9 enter the United States at said points and places, are unlawful and unwarranted and if carried out will work irreparable injury to plaintiffs. A large part of the international commerce carried on by plaintiffs will be destroyed, and the business and profits of plaintiffs will be greatly lessened.

Unless defendant, the Secretary of the Treasury, be enjoined from execution of the said threats plaintiffs will be deprived of their property without just compensation and without due process of law, in violation of their rights under the fifth amendment to the Constitution of the United States. If plaintiffs refuse to accede to said unlawful demands of defendant, their foreign commerce which has been built up during a long series of years and at great expense will be to a large extent destroyed. If they do accede to the unlawful demands, plaintiffs will be compelled to pay to numerous collectors of customs large sums of money, which will be forthwith distributed among a number of employees of the Treasury Department, and plaintiffs will be unable to recover back the same

Wherefore, being without an adequate and complete remedy at law, plaintiffs pray:

1. That the defendant, Andrew W. Mellon, Secretary of the Treasury of the United States, be required to answer the exigencies of this bill.

February 7, 1920, if capable of the construction given to them by the defendant are, therefore, unconstitutional, null, and void.

The said requirements and threatened actions of the defendant are unlawful because contrary to that portion of the "Treaty of Amity, Commerce, and Navigation" made and promulgated between the United States and the King of Great Britain and Ireland in

14 1792, because the plaintiffs are citizens of the United States and large numbers of plaintiffs' passengers are citizens of the United States and subjects of the King of Great Britain and Ireland and citizens of the Dominion of Canada and by the threatened action of the defendant and his subordinates the plaintiffs and these citizens of the United States and subjects of the King of Great Britain and Ireland will be refused permission freely to pass and repass by land into the respective territories and countries of the Dominion of Canada and the territories of the United States on the continent of America, contrary to said treaty, and the statutes of the United States in furtherance thereof, being particularly section 104 of chapter 22 of the act of commerce approved March 2, 1799.

G. F. SNYDER

JULIUS I. PEYSER,

JESSE C. ADKINS,

Attorneys for Plaintiffs.

DISTRICT OF COLUMBIA, ss:

I, G. F. Snyder, do solemnly swear that I am the attorney in fact for the plaintiffs in the above-entitled cause for the purpose of making this affidavit; that I have read over the foregoing amendment to bill of complaint and know the contents thereof; the matters and facts therein stated of my personal knowledge are true and the matters therein stated on information and belief I believe to be true.

G. F. SNYDER.

15 Subscribed and sworn to before me this 20th day of June, 1924.

MORGAN H. BEACH,

Clerk.

By F. E. CUNNINGHAM,

Assistant Clerk.

Order

Filed July 16, 1924

* * * * *

Upon consideration of the motion to dismiss the bill of complaint herein, and after argument by counsel, it is by the court, this 16th day of July, 1924,

Adjudged and ordered that the said motion to dismiss be, and the same is hereby, overruled, with leave to the defendant to answer within ten days.

A. A. HOEHLING,

Justice.

Answer to amended bill of complaint

Filed September 8, 1924

* * * * *

Andrew W. Mellon, Secretary of the Treasury of the United States, for answer to the bill of complaint herein, as amended, says:

(1), (2), and (3). He admits the averments of paragraphs numbered 1, 2, and 3 of said bill of complaint, as amended.

(4). He admits the averments of paragraph numbered 4 of the bill of complaint as amended except such averments as are
16 herein expressly denied. He denies that the United States itself paid the compensation of customs employees and inspectors for services at night and on Sundays and holidays in examining freight entering the United States over the lines of plaintiffs' railroads crossing the international border at Blaine, Washington, and Sumas, Washington, and further denies that prior to 1920 the United States made no effort to collect such compensation, or any part thereof, from plaintiffs.

Further answering said paragraph defendant avers that prior to 1920 the United States collected the compensation of customs employees and inspectors for services at night and on Sundays and holidays from carriers to whom such services were rendered at Blaine, Sumas, Chopaka, Aroville, Molson, Danville, Ferry, Laurier, and Northport, all in the State of Washington, and which are the ports of entry in the United States nearest White Rock, British Columbia, and Midway, Rideau, Grand Fork Junction, Bridesville, and Similkameen, Canada.

(5), (6), and (7). Defendant is advised that the averments of paragraph numbered 5, 6, and 7 of the bill of complaint as amended are conclusions of law which he is not required to answer.

8. Defendant admits the averments of the first subparagraph of paragraph numbered 8 of the bill of complaint as amended.

He is advised by counsel that the averments of the second subparagraph of said paragraph numbered 8 are conclusions of law which he is not required to answer.

9. Defendant is advised by counsel that the averments of paragraph numbered 9 of the bill of complaint as amended
17 are conclusions of law which he is not required to answer.

Wherefore having fully answered, he prays to be hence dismissed with his reasonable costs.

ANDREW W. MELLON.

I, Andrew W. Mellon, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof, and the things and matters therein stated I verily believe to be true.

ANDREW W. MELLON.
EWE M M R. R. M.

PEYTON GORDON,
United States Attorney.

Sworn and subscribed to before me this 5th day of September, 1924.

[SEAL.]

H. W. STUTLER,
Notary Public.

Motion to strike out defendant's answer

Filed January 12, 1925

* * * * *

Now come the plaintiffs and move the court to strike out the defendant's answer for the reason, among others, that the said answer sets forth no defense to the said bill of complaint.

JULIUS I. PEYSER,

G. F. SNYDER,

JESSE C. ADKINS,

Attorneys for the Plaintiffs.

18

Final decree

Filed January 12, 1925

* * * * *

The cause came on to be heard upon the bill of complaint as amended, the answer of the defendant, and the plaintiff's motion to strike out the same, and thereupon, on consideration thereof, it is this 12th day of January, A. D. 1925;

Adjudged, ordered, and decreed that the motion to strike out be, and the same is hereby, sustained.

And the defendant having stated that he did not wish to amend his answer, it is further

Adjudged, ordered, and decreed that section 5 of the act of Congress approved February 13, 1911, entitled "An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and other purposes," as amended by the act of Congress approved February 7, 1920, entitled "An act to amend an act entitled 'An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and other purposes,' approved February 13, 1911," and the tariff act of 1922, do not require, nor does any law of the United States require the plaintiffs or any of them to pay extra compensation or any compensation whatever, for overtime services or any services whatever of customs officers or employees at points on the international border or at the port of first arrival in connection with the lading or unlading or examination of freight or merchandise (whether for transportation in bond or for

19 exportation in bond, or for exportation with the benefit of drawback, or for importation into the United States) transported from Canada on trains running over the lines of railroad of the plaintiffs or any of them and entering the United States between the hours of five p. m. and eight a. m. or at night, as defined in said acts, or on Sundays or holidays; and the defendant, Andrew W. Mellon, as Secretary of the Treasury of the United States, and his successors, and all subordinates in office, be, and they are, and each of them is, hereby perpetually enjoined from holding to the contrary, and from fixing or attempting to fix rates of extra compensation for overtime services of any customs officers and employees who may be required to remain on duty between the hours of five p. m. and eight a. m. or at night or on Sundays or holidays, at points on the international border or at the port of first arrival, to perform services in connection with the lading or unlading or examination of such freight or merchandise arriving by railroad from Canada into the United States between the hours aforesaid or at night or

on Sundays and holidays aforesaid; and the defendant, Andrew W. Mellon, as Secretary of the Treasury of the United States, his subordinates and successors in office, are perpetually enjoined from collecting, and from requiring, directing, authorizing, or permitting any collector of customs of the United States, or any other officer, agent, or employe of the United States, to collect from the plaintiffs or any of them, extra compensation or any compensation whatever, for overtime services or any services whatever, of customs officers or employes in connectoin with the lading or unlading or examination of such freight or merchandise arriving by railroad from Canada between the hours aforesaid, or at night as aforesaid, and on
 20 Sundays and holidays, and from directing, authorizing, or permitting any collector of customs or other officer or employe of the United States to refuse to permit trains of the plaintiffs, or any of them, to enter the United States at the times aforesaid for the failure to pay compensation for the services aforesaid.

A. A. HOEHLING,
Justice.

From the foregoing decree, defendant Andrew W. Mellon, Secretary of the Treasury, in open court, notes an appeal to the Court of Appeals of the District of Columbia.

A. A. HOEHLING,
Justice.

Assignments of error

Filed January 28, 1925

* * * * *

Comes now the defendant, Andrew W. Mellon, Secretary of the Treasury of the United States, by and through his attorney, Peyton Gordon, United States attorney in and for the District of Columbia, and assigns as error the following:

(1) That the court erred in entering the final decree herein.

(2) That the court erred in holding that no law of the United States requires the plaintiffs to pay extra compensation for overtime services of customs officers or employees in connection with the lading or unlading or examination at points on the international border or at the ports of first arrival of freight or merchandise
 21 transported from Canada on trains running over the lines of railroad of plaintiffs, and entering the United States between the hours of five p. m. and eight a. m., or at night as defined in the tariff act of September 21, 1922, or on Sundays or holidays.

(3) That the court erred in not holding that the said tariff act of 1922 requires plaintiffs to pay extra compensation for overtime services of customs officers and employees in connection with the lading, unlading, and examination at points on the international border or at ports of first arrival of freight or merchandise transported from Canada on trains running over the lines of railroad of plaintiffs entering the United States between the hours of five p. m. and eight a. m. and at night as defined in said tariff act of 1922 and on Sundays and holidays.

(4) That the court erred in issuing the injunction herein.

(5) That the court erred in overruling defendant's motion to dismiss bill of complaint as amended.

(6) That the court erred in not dismissing the bill of complaint as amended.

PEYTON GORDON,
United States Attorney, Attorney for Defendant.

22 *Designation of record*

Filed January 28, 1925

* * * * * *

The clerk will please prepare a transcript of the record in the above-entitled cause on appeal to the Court of Appeals of the District of Columbia and include therein the following:

1. Bill of complaint.
2. Motion to dismiss bill.
3. Amendment to bill.
4. Order overruling motion to dismiss.
5. Answer.
6. Motion to strike answer.
7. Final decree.
8. Note of appeal.
9. Assignments of error.
10. This designation.

PEYTON GORDON,
United States Attorney, Attorney for Defendant.

Service of copy of above designation acknowledged this 27th day of January, 1925.

JESSE C. ADKINS,
Attorney for Plaintiffs.

23 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 22, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42496 in equity, wherein New York Central Railroad Company et al. are plaintiffs and Andrew W. Mellon, Secretary of the Treasury of the United States, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16th day of February, 1925.

[SEAL.]

MORGAN H. BEACH,
Clerk.

EW

(Indorsed on cover :) District of Columbia, Supreme Court. No. 4297. Andrew W. Mellon, Secretary, &c., appellant, v. New York Central Railroad Company, the Michigan Central Railroad Company, Vermont Central Railway, et al. Court of Appeals, District of Columbia. Filed February 25, 1925. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 21 1925

Henry H. Hodges

No. 4297

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**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1925

ANDREW W. MELLON, SECRETARY OF THE TREASURY
OF THE UNITED STATES, APPELLANT

v.

NEW YORK CENTRAL RAILROAD COMPANY, A BODY
CORPORATE, ET AL., APPELLEE

BRIEF FOR APPELLANT

PEYTON GORDON,

United States Attorney in and for the District of Columbia.

LEO A. ROVER,

Assistant United States Attorney.

JESSE P. CRAWFORD,

Special Assistant United States Attorney, Attorneys for Appellant.

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In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1925

No. 4297

ANDREW W. MELLON, SECRETARY OF THE TREAS-
ury of the United States, appellant

v.

NEW YORK CENTRAL RAILROAD COMPANY, A BODY
Corporate, et al., appellees.

BRIEF FOR APPELLANT

STATEMENT OF FACTS

This is an appeal by appellant, Secretary of the Treasury, defendant below, from a decree by the Supreme Court of the District of Columbia holding that the Secretary was not authorized under any law of the United States to require the appellee railroads, plaintiffs below, to pay extra compensation for overtime services of customs inspectors who may be required to remain on duty at night (between the hours of five p. m. and eight a. m.) or on Sundays or holidays in connection with the unlading, receiving, or examination of freight or merchandise at points on the international border between Canada

and the United States, and enjoining the Secretary from attempting to collect such compensation.

The appellee railroads operate freight trains which enter the United States at points on the international border between Canada and the United States at night and on Sundays and holidays. (Rec. pp. 2, 3.) The Secretary of the Treasury undertook to collect from the appellees the extra compensation provided for customs inspectors under paragraph 451 of the Tariff Act of 1922 (42 Stats. 858, 954) for overtime services in connection with such examination at such times and places (Rec. p. 4), and is threatening that unless the same be paid, the services at night and on Sundays and holidays will be withdrawn. (Rec. p. 5.)

While this case relates only to extra compensation for services in connection with the examination of freight and merchandise, it is very similar, in the questions involved because arising under the same laws, to the case of *Mellon v. Minneapolis, St. Paul & Sault Sainte Marie Railroad Company, et al.*, No. 4273, now pending before this court on appeal from a decree by the Supreme Court of the District of Columbia in which briefs have been filed, and which involves extra compensation for services in connection with the examination of passengers' baggage only. Many of the points urged in the brief of counsel for appellees in that case, *if applicable thereto*, would be applicable to this case also, and, therefore, will be discussed and answered herein.

ASSIGNMENTS OF ERROR

(1) That the court erred in entering the final decree herein.

(2) That the court erred in holding that no law of the United States requires the plaintiffs to pay extra compensation for overtime services of customs officers or employees in connection with the lading or unlading or examination at points on the international border or at the ports of first arrival of freight or merchandise transported from Canada on trains running over the lines of railroad of plaintiffs and entering the United States between the hours of five p. m. and eight a. m., or at night as defined in the tariff act of September 21, 1922, or on Sundays or holidays.

(3) That the court erred in not holding that the said tariff act of 1922 requires plaintiffs to pay extra compensation for overtime services of customs officers and employees in connection with the lading, unlading, and examination at points on the international border or at ports of first arrival of freight or merchandise transported from Canada on trains running over the lines of railroad of plaintiffs entering the United States between the hours of five p. m. and eight a. m., and at night as defined in said tariff act of 1922, and on Sundays and holidays.

(4) That the court erred in issuing the injunction herein.

(5) That the court erred in overruling defendant's motion to dismiss bill of complaint as amended.

(6) That the court erred in not dismissing the bill of complaint as amended.

THE LAWS INVOLVED

Sections 450 and 451 of the Tariff Act, the construction of which is involved in this proceeding, read as follows:

SEC. 450. *Same (unlading)—Sundays and holidays.*—No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe.

SEC. 451. *Same—Bond.*—Before any such special license to unlade shall be granted, the master, owner, or agent of such vessel or vehicle shall be required to give a bond in a penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees whose services are required in connection with such unlading at night or on Sunday or a holiday in accordance with the provisions of section 5 of the Act entitled “An Act to provide for the lading or unlading of vessels at night, the preliminary entry

of vessels, and for other purposes," approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unloading of vessels or vehicles belonging to such line for a period of one year from the date thereof.

Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (41 Stats. 402), referred to in the preceding section of the Tariff Act, reads as follows:

SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unloading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unloading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond 5 o'clock postmeridian (but

not to exceed two and one-half days' pay for the full period from 5 o'clock postmeridian to 8 o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night, or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officers who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours

of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Approved February 7, 1920.

The so-called Night Unlading Act of February 13, 1911, originally consisted of six sections. The first four sections constituted entirely the basis for the operation of Section 5. Section 6 contained provisions repealing prior Acts. The first four sections were repealed by the Tariff Act of 1922 and read as follows:

SECTION 1. That upon arrival at any port in the United States of any vessel or other conveyance from a foreign port or place, either directly or by way of another port in the United States, or upon such arrival from another port in the United States of any vessel or other conveyance belonging to a line designated by the Secretary of the Treasury as a common carrier of bonded merchandise, and, after due report and entry of such vessel in accordance with existing law or due report, under such regulations as the Secretary of the Treasury may prescribe, of the arrival of such other conveyances the collector of customs, with the concurrence of the naval officer at ports where there is a naval officer, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of any such vessel or other convey-

ance at night; that is to say, between sunset and sunrise.

SEC. 2. That the master of any vessel from a foreign port or place, upon arrival within a customs collection district of the United States, bound to a port of entry in such district, may make preliminary entry of the vessel by making oath or affirmation to the truth of the statements contained in his original manifest and delivering his said original manifest to the customs officer who shall board such vessel within such district, with a copy of said original manifest for the use of the naval officer at ports where there is a naval officer; whereupon, upon arrival at the wharf or place of discharge, the lading or unlading of the cargo of such vessel may proceed, by both day and night, under such regulations as the Secretary of the Treasury may prescribe.

SEC. 3. That before any such special license to lade or unlade at night shall be granted and before any permit shall be issued for the immediate lading or unlading of any such vessel after preliminary entry, as hereinbefore provided, either by day or by night the master, owner, agent, or consignee of such vessel or other conveyance shall make proper application therefor and shall at the same time execute and deliver to the United States, through the collector of customs, a good and sufficient bond, in a penal sum to be approved by the said collector, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may

occur or be occasioned by reason of the granting of such special license or the issuing or granting of such permit for immediate lading or unlading; or the master, owner, agent, consignee, or probable consignee, as aforesaid, may execute and deliver to the United States, in like manner and form, a good and sufficient bond, in the penal sum of fifty thousand dollars, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special licenses and the issuing or granting of such permits for immediate lading or unlading by day and night during the period of six months.

SEC. 4. Such application having been duly made and the required bond having been duly executed and delivered, special license or licenses to lade or unlade at night after regular entry of vessels, and due report of other conveyances, may be granted, and a permit or permits may be issued for the immediate lading and unlading, by day and night, of vessels admitted to preliminary entry, or of other conveyances of which due report of arrival has been made: *Provided*, That the provisions of this act shall extend and be applicable to any vessels or other conveyances bound to a port of entry in the United States to be unladen at a port of delivery or to be unladen at a place of discharge designated by the Secretary of the Treasury under the provisions of section twenty-seven hundred and seventy-six of the

Revised Statutes as amended: *Provided further*, That when preliminary entry of a vessel shall be made by the master as herein provided he shall not be relieved from making due report and entry of his vessel at the customhouse in accordance with existing law, and any liability of the master or owner of any such vessel to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed.

REVIEW OF LEGISLATION AND PRACTICE

While Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920, *supra*, and Sections 450 and 451 of the Tariff Act of 1922, *supra*, are the only laws directly involved, a knowledge of the legislation and practice out of which the law now in effect developed is essential to and will facilitate proper consideration of the subject.

Prior to 1873 Congress had made no provision for unloading the cargo of vessels from foreign ports after sunset, or on Sundays or holidays except in cases of distress. (See Act March 2, 1799, 1 Stats. 665.) The Act of March 3, 1873 (subsequently incorporated in the Revised Statutes as Section 2871) authorized the unloading of vessels after sunset under a special license issued in the discretion of the collector, only as a matter of grace. No provision was made in the Act for the unloading of "other conveyances," such unloading being limited to vessels, and

the special license was issued for the unloading of cargo only. Under that Act the steamship owner was required to pay the compensation of the inspectors who worked after sunset superintending the unloading of cargo. There was no provision made in the Act for the unloading of passengers or passengers' baggage after sunset.

In 1894 certain steamship agents represented to the Treasury Department that it was a great hardship on passengers to be compelled to remain upon a vessel after sunset when the vessel had been passed by the quarantine officials. The Department declined to allow passengers and their baggage to be landed after sunset upon the ground that there was no appropriation for paying inspectors for overtime service in connection with the examination of the baggage. The steamship companies suggested that Section 2871 of the Revised Statutes, authorizing the payment of compensation for supervising the unloading of vessels' cargoes, was sufficiently broad to permit the payment of compensation for services in connection with baggage, on the theory that baggage was a part of the cargo. The question was submitted to the Solicitor of the Treasury who advised (T. D. Circular No. 54 of April 4, 1894) that compensation could be exacted for the examination of passengers' baggage after sunset under Section 2871 of Revised Statutes, on the theory that baggage was cargo.

After the practice of unloading passengers and baggage after sunset had been thoroughly established,

the steamship companies then made representation to the Department that passengers' baggage was not cargo and that they could not be required to pay extra compensation for overtime services in connection therewith. The question was again submitted to the Solicitor of the Treasury, who rendered an opinion (T. D. Circular No. 80 of April 18, 1895) to the effect that passengers' baggage was not cargo within the meaning of the statute. (See T. D. No. 15917.) The practice of landing passengers and baggage after sunset was continued, and the inspectors performed the work incident thereto without pay. In 1898 however, the inspectors raised the question of compensation under Section 2871 and the matter was again referred to the Solicitor of the Treasury who under date of April 14, 1898, rendered an opinion to the effect that passengers' baggage was a part of the cargo and that steamship companies could be required to pay inspectors for examining the same after sunset. For some unexplained reason this opinion was not followed by the Secretary of the Treasury.

In 1906 when the practice of handling bonded merchandise imported into the United States by railroad trains had become prevalent it was found necessary to amend Section 2871, Revised Statutes, so as to allow the lading and unlading of bonded merchandise from railroad cars after sunset. Accordingly Section 2871, Revised Statutes, was amended and its provisions extended by the Act of June 30, 1906 (34 Stats. 633) to include lading as well as

unlading of cargo. The application of its provisions to "vessels" was also extended to "vessels and other conveyances." That the words "other conveyances" were clearly intended to be applicable to railroad trains, is apparent from the conference report submitted when the Act of June 30, 1906, was under consideration by Congress. That report reads in part as follows:

The conferees' report recommends that the House recede from its disagreement to the amendments of the Senate and agree to the same. The Bill provides for the unlading of vessels in the night time carrying imported goods under certain provisions contained in the Bill. The amendments of the Senate extend this privilege, and these provisions to other vehicles than vessels, with the intention of including the unlading of imported merchandise from freight cars. These amendments render it necessary, also, to provide for the lading as well as the unlading of vessels or other vehicles in the night time. The extension of *this privilege* to those importing goods in cars carries with it the necessity of the provisions for the "lading" as well as the unlading in the night time. [Italics ours.]

The foregoing report was adopted without debate by both Houses on June 28, 1906. It is clear, therefore, that the Act of 1906 using the words "other conveyances" was intended to and did apply to railroad trains. Under this Act the railroads laded and unladed bonded merchandise after sunset and

at certain ports paid the compensation of inspectors therefor without protest for some time.

The next legislation was the Act of February 13, 1911 (36 Stats. 899). This Act repealed Section 2871 Revised Statutes, as amended by the Act of June 30, 1906, and substituted in lieu thereof appropriate provisions embracing the entire scope of both of the repealed statutes. In 1911 the question as to whether or not passengers' baggage was a part of the cargo of the vessel within the meaning of the Act of February 13, 1911, was submitted to the Comptroller of the Treasury, who, in an opinion dated September 5, 1911, held to the contrary, but disclaimed jurisdiction to render an authoritative opinion for the reason that payment for such overtime service did not involve the expenditures of public moneys. The question was again submitted to the Solicitor of the Treasury, who, under date of October 27, 1911, held that passengers' baggage was a part of the cargo within the meaning of the Act of 1911, and that the inspectors were entitled to overtime pay for services in connection therewith. This opinion, however, was never promulgated or acted on by the Secretary of the Treasury; but the question was referred to the Attorney General for further opinion, who, under date of March 3, 1913 (30 Op. A. G. 123), held that passengers' baggage was not a part of the cargo of a vessel.

The next legislation on the subject was the Act of February 7, 1920, amending Section 5 of the Act of February 13, 1911. In presenting the Report of

Committee on Commerce covering this amendment (Senate No. 306, 66th Cong., 1st sess.) Mr. Calder said:

We have had a law on the statute books for a number of years permitting the lading and unlading of vessels at night, for which the Government employees were paid in some such manner as is prescribed in this measure. But a year or two ago the Attorney General held that men could not be paid for passing upon the baggage taken off ships at night, but could be paid for supervising the discharging of the cargoes. That caused some difficulty, because we found a customs official examining baggage at night and being unpaid for it, and right alongside of him a customs official examining cargo and being paid for that. (59 Cong. Rec., Part 1, p. 640.)

The next legislation on the subject is found in Sections 450 and 451 of the Tariff Act of 1922.

There are two significant things in the foregoing recital: (1) The report of the conferees when considering the Act of 1906 clearly indicates that railroad trains were expressly included in that Act, and (2), that while there has long been a contention as to the application of the law to passengers' baggage, this is the first time its application to freight and merchandise imported on railroad cars has been questioned. The Act of 1906 was reenacted by the Act of 1911 and made more specific by the Tariff Act of 1922, thus making certain the application of the law to railroads.

The opinion of the Attorney General, *supra*, was relied on by Mr. Justice Brandeis in support of the decision in the case of *International Railway Co. v. Davidson et al.*, 257 U. S. 506, decided January 30, 1922, wherein it was held at page 512 that the clause in the amendment of 1920, by which the extra compensation payable under Section 5 is extended to cover overtime in connection with the unloading of passengers' baggage, is given full effect if applied to the baggage of passengers on those vessels for the immediate lading and unloading of whose cargoes special license may issue under the first four sections of the Act of 1911. Both the opinion of the Attorney General and the court decision cited related only to passengers' baggage, and were prior to the enactment of the Tariff Act repealing the first four sections of the Act of 1911. The decision, therefore, has no application to the present situation, as was held in a carefully considered opinion involving a similar question in the case of *Port Huron & Sarnia Ferry Company v. Lawson*, 292 Fed. 216, 218. To the same effect see also the decision of the District Court of the United States for the Western District of New York, January 12, 1925, in the case of *Niagara Ferry & Transportation Company v. Bradley et al.*, not reported, but printed in appendix to this brief.

ARGUMENT**I. The word "vehicle" as used in the tariff act includes railroad cars**

In framing the Tariff Act of 1922 Congress was careful to remove every doubt and to leave nothing to construction with respect to the character of conveyances they had in mind, by defining in Section 401 of the Act what shall constitute a vessel and what shall constitute a vehicle for the purposes of the Act, as follows:

(a) The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water or in water and in air.

(b) The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, or through the air.

It is clear, therefore, that a railroad car or train of cars is a vehicle within the meaning of that term in the Tariff Act; and that Sections 450 and 451 of the Act, *supra*, are not limited, as this court held the Act of 1911, as amended, to be in the case of *Mellon v. Minneapolis, St. Paul & S. S. M. Ry.*, 52 App. D. C. 246, to vessels and other carriers by water, but relates as well to railroads.

II. All imported merchandise must be submitted for inspection by customs officers

Section 448 of the Tariff Act makes it unlawful to unlade any merchandise, passengers, or baggage from any vessel or vehicle arriving from a foreign

port or place until entry of such vessel or report of the arrival of such vehicle has been made, and a permit for the unlading of the same issued by the collector, except as to such *vessels* as are not required to make entry under Section 441 of the Tariff Act.

This provision of the statute is necessary in order that all foreign merchandise, whether imported as passengers' baggage or as freight on either vessels or vehicles (railroad cars) may be inspected and examined by customs officers, and the proper amount of duty assessed thereon if dutiable. Imported merchandise must be submitted for inspection and examination whether dutiable or free. *Estes v. United States*, 227 Fed. 818.

It is not for the importer or owner of merchandise, regardless of the method of importation, to decide whether the articles so imported are dutiable or free. That is the duty of customs officials. *United States v. 50 Waltham Watch Movements*, 139 Fed. 291.

By reading Section 450 of the Act it will be observed that permission to unlade either baggage or merchandise from either a vessel or vehicle (railroad car) is not to be demanded as a matter of right, but as a privilege to be sought and obtained under a special license to be granted under such regulations as the Secretary of the Treasury may prescribe.

HI. Special license must be obtained and a bond given before unloading merchandise at night or on Sundays or holidays for inspection

Under Section 451 of the Act the special license provided for in Section 450 cannot be granted until after the master, owner, or agent of such vessel or vehicle shall have given a bond in a penal sum to be fixed by the collector conditioned (1) to indemnify the United States for any loss or liability which might occur by reason of the granting of such special license and (2) to pay the compensation and expenses of the customs officers and employees whose services are required in connection with such unloading at night or on Sunday or a holiday "in accordance with the provisions of Section 5" of the Act approved February 13, 1911, as amended by the Act of February 7, 1920.

The words "in accordance with" mean "after the manner provided in." In the Standard Dictionary the phrase "according to" is given as synonymous with "in accordance with; after the manner of." Any other construction of these words would lead to an absurdity. If compensation for overtime services can be collected only from carriers by water, then carriers by land would be required to give a bond containing two conditions, one of which would have no application to them. This is clearly contrary to the intent of Congress. Section 450 of the Tariff Act clearly prohibits the unloading of baggage from railroads on Sundays or holidays or at night except under special license after giving

bond conditioned to pay the compensation for overtime services for "such unloading." "Such unloading" must refer equally to unloading from carriers by land as carriers by water. It necessarily follows that if railroads are not required to give such a bond, then the special license can not be granted, and the prohibition of section 450 applies. In other words, if compensation for overtime can not be collected from railroads, they are precluded from unloading baggage on Sundays, holidays, or at night.

IV. Section 5 of the Act of 1911, as amended, was made a part of the Tariff Act by adoption and must derive its force entirely from that Act

It was contended by counsel for the appellees in the court below that Section 5 of the Act of 1911, as amended, having been held by that court, and affirmed by this court (52 App. D. C. 246), when construed in the light of the first four sections of that Act, now repealed, to refer only to carriers by water, it must be given the same interpretation now when construed in connection with the Tariff Act into which it has been incorporated by reference. The first question, therefore, which arises in this appeal is the effect of such an incorporation.

Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute.

* * * Where a statute is incorporated in

another, the effect is the same as if the provisions of the former were reenacted in the latter, for all the purposes of the latter statute. Sutherland on Statutory Construction, p. 787.

In *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 391, and 392, the question involved related to the right of a seaman to bring an action on the common-law side of a district court of the United States against the owner of a ship on which he was serving, to recover damages for personal injuries suffered while in the line of duty at sea. The right of recovery was based expressly on Section 20 of the Act of March 4, 1915 (38 Stat. 1185), as amended by Section 33 of the Act of June 5, 1920 (41 Stat. 1007), which states in part:

That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

In its decision the court said at page 391:

Criticism is made of the statute because it does not set forth the new rules but merely adopts them by a generic reference. But the criticism is without merit. The reference, as is readily understood, is to the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its amendments. This is a recognized mode of incorporating one statute

or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference.

The court also said at page 389:

The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the Maritime law. * * * In that form (as amended) it (the section) makes applicable to personal injuries suffered by seamen in the course of their employment "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees." Thus its origin, environment, and subject matter show that it is intended to, and does, bring the rules to which it refers into the Maritime law.

One of the cases cited in the foregoing decision is *Kendall v. United States*, 12 Pet. 524, and one of the questions involved therein was that of the power of the Circuit Court of the District of Columbia to issue a writ of mandamus to a public officer under the authority of Section 3 of the Act of February 28, 1801, declaring that the said court and the judges thereof shall have all the powers by law vested in the Circuit Courts, and the judges of the Circuit Courts of the United States, such Circuit Courts having been established by the Act of February 13, 1801, although this latter Act had been repealed fifteen months after the organization of the court in the District of Columbia.

In its decision (p. 625) the court said in part:

It was not an uncommon course of legislation in the states, at an early day, to adopt by reference, British statutes; and this has been the course of legislation by Congress in many instances where state practice and state process has been adopted * * *. In the case of *Cathcart v. Robinson*, 5 Pet. 280, the court, in speaking of the adoption of certain English statutes, say: by adopting them, they become our own as entirely as if they had been enacted by the legislature. We are then to construe this third section of the Act of 27th of February, 1801, as if the eleventh section of the Act of 13th of February, 1801, had been incorporated at full length; * * *.

Another of the cases cited is *In re Heath*, 144 U. S. page 92, wherein Chief Justice Fuller in delivering the opinion of the court said:

Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication.

Another one of the cases cited is *Interstate Railway Co. v. Massachusetts*, 207 U. S. 79, which involved a complaint against the company for refusing to sell tickets for the transportation of pupils to and from the public schools at one-half the regular fare charged by it, as required by Mass. Rev. Laws, c. 112, Sec. 72. The company admitted the fact, but claimed that the law was unconstitutional in that it denied to

the company the equal protection of the laws and deprived it of its property without just compensation and without due process of law, in that it was compelled to transport a large number of passengers at less than the cost of the service.

The court found that the statute in question was in force when the company took its charter, and that by the act of incorporation the company was—

Subject to all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force relating to street railway companies, except, * * * .

In delivering the opinion of the court Mr. Justice Holmes used the following language:

If the charter, instead of writing out the requirements of Rev. L. 112, Sec. 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, *as the force given to it by reference and incorporation would be derived wholly from the charter.* The document, therefore, might as well be an unconstitutional as a constitutional law * * *. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear * * *. [Italics ours.]

In the case of *People v. Crossly*, 261 Ill. 78, 85, the court was called upon to construe a statute author-

izing the organization of high-school districts. Section 5 of the statute provided that the Board of Education created thereby should have all of the powers and duties of boards of education under the general school law. Speaking of the effect of such an incorporation by reference, the court said:

The effect of this section is to incorporate into the act all of those sections of the general school law relating to the powers and duties of boards of education as the same existed at the time the act in question was passed. This is simply the familiar legislative process of adopting certain portions of another statute by reference. * * * The effect of such reference is the same as though the statute or the provisions adopted had been incorporated bodily into the adopting statute. (2 Sutherland on Stat. Const. 405.)

To the same effect see—

State v. Board, 170 Ind. 595, 619.

Nunes v. Wellesch, 75 Ky. 363, 367.

It is important to observe that the Act of February 13, 1911, originally consisted of six sections. The fifth section, as amended, relates to the payment of extra compensation and provides a schedule for such payment. The first four sections constitute entirely the basis for the operation of Section 5. Without them, or some other basis in lieu thereof, Section 5 would have nothing whatever on which to operate, and, therefore, would be useless. Section 6 contained provisions repealing prior Acts. The first

four sections were repealed by the Tariff Act of 1922 and, therefore, the applicable provisions of the 5th section, under the rules of construction established in the cases cited, must be considered as having been enacted for the first time in the Tariff Act, and as deriving their force entirely from the new field into which they have been translated, and not in any respect from the source from which they were drawn.

V. Reason and purpose of the law

In the interpretation of a statute it is indispensable to a correct understanding thereof first to inquire as to its subject and the object which is intended to be accomplished. (Lewis' Sutherland Statutory Construction, Vol. 2, Sec. 347.) "The preexisting law and the reason and the purpose of the new enactment are also considerations of great weight." (*Smythe v. Fiske*, 23 Wall. at 380; *United States v. Fisher*, 2 Cranch at 386.)

It is shown in the Review of Legislation and Practice, ante, that under preexisting law, as found in the Act of 1873 and Section 2871 Revised Statutes, the disadvantage under which railroads were operating as compared with vessels, with respect to lading and unlading at night and on holidays, was the source of so much contention and dissatisfaction that Congress attempted to remove the objectionable conditions by the Act of June 30, 1906, which is shown by the conferees' report thereon to have been intended to place vessels and freight cars on the same basis with respect to lading and unlading at

night. It is also shown by the report of the Committee on Commerce, ante, having charge of the Bill, that the Act of February 7, 1920, amending the Act of February 13, 1911, was intended to remove the long and serious contentions resulting from inequalities theretofore existing in the compensation of inspectors for their overtime services in connection with the examination of freight and baggage on vessels.

In order, however, to accommodate the railroads desiring to enter their trains at night, customs inspectors after remaining on duty all day were required to render overtime services without compensation (payment for overtime by the Government to its employees being prohibited by the Act of March 15, 1898, 30 Stats. 316), while inspectors doing exactly the same work in connection with the unloading of vessels were receiving extra compensation. It was to remedy this unjust and inequitable condition that Sections 450 and 451 of the Tariff Act were passed, following the trend of previous legislation, and making clear the intention of Congress to remove entirely the last vestige of any inequality which might continue to exist as the result of the Supreme Court decision, *supra* (257 U. S. 506), by providing not only for equal conditions under which merchandise and baggage may be unladen from both vessels and vehicles (railroad cars), but also an equal basis of compensation for overtime services of inspectors engaged in unloading the two classes of carriers.

There is no reason why, if the railroads wish their trains to enter the United States at night or on Sundays and holidays, they should not be compelled to pay for the privilege and the service rendered for their accommodation in the same manner as vessels. Under our construction of Sections 450 and 451 carriers by land and carriers by water stand upon the same plane in this regard.

It is clear, therefore, that these successive statutes, including Sections 450 and 451 of the Tariff Act, are remedial statutes, and as such should be liberally construed to accomplish the purpose of their enactment. (*Insurance Co. v. Dunn*, 19 Wall. at 224; *Stewart v. Kahn*, 11 Wall. at 504; *Parks v. Turner*, 12 How. at 46; Encyc. U. S. Sup. Ct. Rep., Vol. 11, p. 162.)

A case directly in point is *Texas v. Childs*, 21 Wall. 488, 491, wherein the Supreme Court, speaking through Mr. Justice Swayne, said:

The case is one where the language is so clear and comprehensive that there is no room for construction, and the duty of the court is simply to give it effect according to the plain import of the words. * * * But if there were doubt on the subject, the statute being remedial in character, the doubt should be resolved in a liberal spirit in order to obviate as far as possible the existing evils.

There appears to be no need for resorting to construction. Section 451 of the Tariff Act is perfectly clear on its face when read in connection with Sec-

tion 5 of the Act of 1911 which is made a part of the Tariff Act by reference. It becomes possible to throw doubt upon its natural meaning only by resorting to the repealed sections of the Act of 1911 and the decisions thereunder which are no longer controlling. This violates the rule applicable in such cases, and relied on by the Supreme Court in the case of *Hamilton v. Rathbone*, 175 U. S. 414, 419, 421, as follows:

The general rule is pretty well settled that * * * where the act is clear upon its face, and when standing alone is fairly susceptible of but one construction, that construction must be given it, * * * prior acts may be resorted to, to *solve* but not to *create* an ambiguity.

VI. Executive construction is entitled to great respect

Following the enactment of the Tariff Act of September 21, 1922, the Treasury Department in a decision No. 39331 dated November 22, 1922, reviewed the provisions of Sections 450 and 451 of the Act, authorizing the Secretary of the Treasury to prescribe regulations to make the provisions thereof effective, and then expressed the opinion for the guidance of customs officers as follows:

The department is of the opinion that the language of section 450 is plain and specific and requires that the extra compensation shall be paid regardless of whether the services are performed in connection with the unloading of cargo or the examination of baggage, and

whether the cargo or baggage arrived by vessel train, or other vehicle, and you are accordingly directed to require from all railroad companies entering your district the bond provided by section 451, *supra*, before permitting your officers to perform any overtime service at night, Sundays, or holidays, of the kind mentioned in section 450.

Subsequently, upon the receipt of a petition from railroads crossing the Canadian border for the modification of T. D. 39331 in certain respects, the Department in a Treasury Decision dated March 7, 1923 (No. 39502) reviewed the previous laws and decisions thereunder relating to the subject, and affirmed its former decision No. 39331, in language in part as follows:

The department has before it a petition from the railroads entering the United States from Canada that T. D. 39331 be so modified that they be relieved from the payment of extra compensation for overtime service, whether such service be in connection with the examination of passengers' baggage or in connection with the lading or unlading of merchandise. The petition is based upon the decisions of the courts above cited, and the argument that section 450 of the present tariff act does not require railroad trains to secure special licenses to unlade baggage or merchandise at night or on Sundays or holidays, as section 459 is the provision of law controlling imports from contiguous foreign territory, and that this section merely requires that the person in charge of

any vehicle arriving in the United States from contiguous territory to report his arrival in the United States from such contiguous territory to the customs officer at the port of entry or customhouse which shall be nearest to the place the vehicle shall cross the boundary line.

Inasmuch as the four sections referred to in the decision of the Supreme Court were expressly repealed by section 641 of the tariff act and section 450 of the present tariff act provides that no merchandise, baggage, or passengers arriving in the United States from any foreign port or place shall be unladen from the carrying vessel or vehicle on Sundays, holidays, or at night except under special license granted by the collector, the department is of the opinion that a different situation is presented, as it will not be denied that Canada is a "foreign place," and as section 401 of Part I of Title IV of the tariff act defines "vehicle" as including every description of carriage or other conveyance used or capable of being used as a means of transportation on land or through the air, the department is of the opinion that railroad trains fall clearly within the definition and that a special license is accordingly required.

In view of the foregoing, the department affirms its decision of November 22, 1922 (T. D. 39331), that extra compensation must be paid by railroads for overtime services at night and on Sundays or holidays, whether such services are performed in connection with the lading or unloading of merchandise or the examination of baggage.

Since the Secretary of the Treasury was charged by law with the duty of prescribing proper regulations for carrying into effect the provisions of Sections 450 and 451 of the Tariff Act, his construction of the meaning of the law is entitled to very great respect.

In the case of *Malley v. Walter Baker & Co.*, 281 Fed. 41, the court in discussing this point, at page 46 of the decision, used the following language:

But it is elementary that, if ambiguity is found in a statute, or when it is necessary to determine a fact upon which the operation of a statute is made to depend, the regulations made by the department charged with the administration of the act are to be given great, sometimes practically controlling, weight.

One of the numerous cases cited by the court in support of its decision was *Edwards v. Darby*, 12 Wheaton 206, in which the court said, at page 209:

In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

Another authority cited by the court in the *Walter Baker & Co.* case was that of *Jacobs v. Prichard*, 223 U. S. 200, wherein the court, at page 214, used the following language:

The rule which gives strength to the construction of the officers who are directed to execute the law and who, it has been said, may have written or suggested it, is given an

added force from one of the provisions of the act of Congress. It directs the Secretary of the Interior "to make the necessary regulations to carry out the purposes" of its enactment.

While it is contended that the existing law is perfectly clear on its face, and requires no construction, yet in the event the court should be of the opinion that the terms thereof are ambiguous or doubtful in meaning, the rule of construction as laid down in the cases cited would seem to conclude the matter in favor of the interpretation contended for by the appellant.

VII. Overtime pay collected from carriers is not a direct tax

In the amendment to the bill of complaint (Rec. pp. 7 and 8) it is alleged that the statute under consideration here is unconstitutional in that it attempts to levy a direct tax which is not apportioned among the several States according to the population thereof. But this is not a tax imposed upon property solely by reason of its ownership, and is therefore not a direct tax, but an excise tax for the privilege of unloading under special license.

Knowlton v. Moore, 178 U. S. 41.

Flint v. Stone Tracy Co., 220 U. S. 107, 145-152.

The only uniformity required in the levying of an excise tax is geographical.

Flint v. Stone Tracy Co., *supra*.

Evans v. Gore, 253 U. S. 245.

This question was presented to the court in the *Port Huron Ferry Co. case*, *supra*, 292 Fed. 216, in which the court said, at p. 220:

It is further urged by plaintiff that the effect of the legislation in question is to impose a direct tax without apportionment according to population, contrary to the second and ninth sections of Article I of the Federal Constitution. It is, however, manifest that any tax involved in this legislation is not a direct tax upon any specific property, but an excise tax upon the privilege of unloading in accordance with the special permission granted; and it is elementary that such an excise tax need not be apportioned according to population.

The contention that the effect of the statute is to impose a tax upon vessel owners for private purpose, namely, for the benefit of the customs officers and employees whose services are required in connection with the special unloading thus permitted, is equally without merit. Under the terms of the statute, the compensation for such overtime services is not paid by the licensee to such officers or employees, but to the Collector of Customs, who pays the extra compensation which has been fixed by the Secretary of the Treasury, to those entitled thereto, according to the rate so fixed. In substance and essence the recipient of the special license so granted indemnifies and reimburses the Government for the additional liability and expense incurred by it by reason of the extra cost of grant-

ing this special license. The customs officials performing the overtime services required are employed by, and look for payment of their compensation to, the Government, which, in turn, is thus reimbursed and saved harmless by the licensee. This does not render the purpose of the payment a private benefit, and Congress is well within its constitutional powers in making provisions for such a transaction. In *re River Rouge Condemnation Proceedings* [D. C.], 266 Fed. 105.

The contention by counsel for the appellees that such charges against carriers constitute a direct tax, would therefore seem to be without force.

VIII. Efforts by the Secretary of the Treasury to enforce payments of compensation by the railroads is not in violation of the Treaty of Amity, Commerce, and Navigation of 1794

In the amendment to the bill of complaint (Rec. p. 8) it is also alleged that the said requirements and threatened actions of the Secretary of the Treasury are in violation of the "Treaty of Amity, Commerce, and Navigation" made between the United States and Great Britain in 1792. Inasmuch as there does not appear to have been any such treaty in 1792, it is believed that it was intended to refer in the bill of complaint to the "Treaty of Amity, Commerce, and Navigation" between the two countries in 1794 (8 Stats. 116), commonly known as the Jay Treaty.

In the *Port Huron Ferry Co. case*, *supra*, 292 Fed. 216, a similar contention was made by the plaintiff, and the court held, at page 220, in part as follows:

Finally, it is said that the Jay Treaty of 1794 (8 Stats. 116) between the United States and Great Britain compels the construction of the statute contended for by plaintiff and forbids the threatened acts of the defendants, because that treaty gives the right to the citizens of both of the contracting countries "freely to pass and repass" into the respective countries, and provided that "all goods and merchandise whose importation into the United States shall not be wholly prohibited may freely, for the purpose of commerce, be carried into the same." This treaty is, of course, one of the laws of the United States which, if inconsistent with the terms of the subsequently enacted legislation here involved, has been expressly repealed thereby, as already indicated. It is, however, to be noted that the treaty itself makes provisions for the payment of customs duties upon the merchandise carried between the two countries, and it therefore impliedly and necessarily contemplates and recognizes the right on the part of each nation to make such rules and regulations as are reasonably required for the proper enforcement of its customs laws; and it certainly can not be said that the regulations here in question are not of that character.

A further answer to such contention may be found in a letter addressed by the Department of State to W. M. Malloy, January 20th, 1910, in

reply to a request for advice as to the effect of the war of 1812 on the treaties of 1782, 1783, 1794, and 1802, wherein the State Department said:

With respect to the British treaties mentioned you are informed that they were claimed by Great Britain after the conclusion of the treaty of Ghent, to have been terminated by the war of 1812. In a note from Lord Bathurst to John Quincy Adams, it is stated "she (Great Britain) knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties." (American State Papers, Vol. 4, p. 354.) Against this view of the British Government and its unqualified expression the United States protested. (On the effect of war on treaties, see Moore's Digest of International Law, Vol. 5, p. 372.)

The foregoing is found in a footnote in "Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and other Powers, 1776-1909," compiled by W. M. Malloy under a resolution of the Senate—Senate document 357, Vol. 1, page 580.

Regardless of whether the Jay Treaty of 1794 may or may not have been terminated, the British Government has placed itself in the position of claiming termination, and therefore could not consistently press for any advantages or privileges thereunder following the application of Section 5 of the Night Unlading Act, as amended, to transportation by railroads from Canada.

It is not necessary however to rely on the possible termination of the treaty in connection herewith for the reason that Article III thereof providing that—

All goods and merchandise whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same,

also provides that—

Such goods and merchandise shall be subject to no higher or other duties than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said States.

Certainly the words “may freely, for the purpose of commerce, be carried into the same,” which are reciprocal in their application, can not be interpreted as authorizing absolutely unrestricted passage of such merchandise without the necessary administrative procedure for the enforcement of the Customs’ laws of the two countries, particularly in view of the further provision in the treaty relating to duties to be collected.

IX. The Tariff Act of 1922 is more than a mere restatement of preexisting law, and carries many changes

At pages 19, 20, and 21 of the brief for appellees in the *Minneapolis, St. Paul & S. S. M. Railroad Company’s case*, No. 4273, now pending, and which involves a similar question with respect to passengers’ baggage, several amendments made by the Senate

to the bill as it passed the House are referred to in an apparent attempt to show that the administrative portion of the Tariff Act of 1922 is, in effect, nothing but a codification of preexisting laws, without any changes therein, and by reason of which every provision thereof, including Section 5 of the Act of 1911, as amended, should be given the same construction as it had received prior to the passage of the Tariff Act.

On the contrary, just the reverse is true. Many changes were made. The bill as it passed the House was evidently an attempt at codification as shown by a declaration in Section 645 of the House Bill as follows:

The provisions of this title are hereby declared to be a revision and codification of the laws herein modified or repealed, and are to be so held and construed.

Had that declaration remained in the law as finally passed by the Senate, serious difficulties would have arisen in construction. By amendment 2431, however, the Senate struck out the declaration quoted and the House receded. In referring to the amendment, the conferees said:

The Senate strikes out this provision because the ordinary rules of statutory construction should apply.

In other words, the courts were to be left free to interpret and construe the new law, and particularly the changes and modifications referred to in Section 641 of the Act, in accordance with the plain meaning

of the language used therein, and other ordinary rules of construction, without being bound by former decisions which were no longer applicable because of a changed situation. In fact Section 641 not only refers to the modifications and changes in the law but provides for the legal status of rights then accrued and suits then pending, which might have been affected by the changes.

As further evidence that the contention in the brief for appellees referred to above is not well founded, it will suffice to mention one change alone which revolutionized in a large measure the conditions under which imports may be made from contiguous countries.

By reading Section 459 it will be observed that it relates only to the importation of merchandise and baggage from contiguous countries in vessels of less than 5 net tons and in vehicles, and requires that the Master of any such vessel and the person in charge of any such vehicle shall immediately *report* his arrival to the Customs Officer nearest the place of entry into the United States.

Prior to the enactment of the Tariff Act of 1922 the importation of merchandise into the United States was prohibited in vessels of less than 30 tons burden, except from the Dominion of Canada and Mexico, and then only into districts adjacent to and adjoining those two countries. (See Sections 3095 and 3096, R. S.)

Sections 3095 and 3096, R. S., were repealed by Section 642 of the Tariff Act of 1922; and the effect

of Section 459 of the Tariff Act relating to imports from contiguous countries is to remove entirely the prohibition against importations of merchandise by sea in vessels of less than thirty tons burden, and to place vessels of less than five net tons, when arriving from contiguous countries, on the same basis as vehicles arriving in the United States from contiguous countries, with respect to the *report* to be made to Customs Officers by the Masters and persons in charge of such vessels and vehicles.

By the same section also the forfeiture of a vessel or vehicle from which merchandise shall be unladen without a permit is not restricted to cases involving dutiable merchandise only, as was the case under the former law (Section 3099, R. S.), but extends to free goods also.

The fact that a few of the Senate amendments had the effect of preserving and keeping in effect some of the former laws does not warrant the contention that no changes were made or intended in preexisting laws.

X. Provisions of the Tariff Act specially applicable to commerce with contiguous countries are not exclusive of all other provisions of the law

At pages 21, 22, 23, and 24 of the brief for appellees, in case No. 4273 referred to above, an attempt is made to show that the administrative portion of the Tariff Act provides two separate and distinct systems of law, one covered by Sections 459 to 466, inclusive, of the Act and being applicable to com-

merce with contiguous countries alone and the other being covered by Sections 432 to 458 of the Act and being applicable only to commerce with foreign ports and places other than contiguous countries.

In support of that contention Section 459 of the Act as it left the House of Representatives is quoted in full on page 21 of the brief referred to.

Section 459 as it passed the House evidently was an effort on the part of the House to make all vessels, vehicles, and merchandise arriving from contiguous countries subject to *all* the provisions of law relating to vessels and merchandise arriving from other countries by sea. This was somewhat similar to, but far more drastic than, certain provisions in Section 3097, Revised Statutes (repealed), and would be impossible of universal application.

Under the law as it existed prior to the Tariff Act the provisions applying to commerce with contiguous countries were found in a separate chapter in the Revised Statutes, by reason of which a statutory declaration of that character was necessary in order to make the general customs laws as applied to merchandise on vessels, applicable also when practicable to importations by vehicles, or "other conveyances." Under the present Tariff Act, however, vessels and vehicles are grouped together in certain sections of the Act, and made subject by such grouping to the same provisions of those sections. Such a declaration as was found in Section 459 of the House bill was, therefore, not only unnecessary,

but would have required impossible applications of the law in some cases.

While the provisions of Sections 459 to 465, inclusive, of the Tariff Act of 1922 relate specifically to importations from contiguous countries they do not exempt such importations from other administrative provisions and requirements in Part 2, Title IV, of the statute relating generally to "Report, Entry, and Unlading of Vessels and Vehicles" when such provisions and requirements are susceptible of application. It is important to note that Part 2 includes both groups of sections which counsel for appellees attempt to segregate in their brief referred to above.

By reference to Sections 433, 434, and 435 of the Tariff Act it will be observed that masters of vessels arriving from foreign ports must *report* such arrivals to customs officers within twenty-four hours thereafter, and in addition thereto are required to make *entry* of such vessels in the manner prescribed, within forty-eight hours after arrival. These are navigation instead of customs requirements and are not applicable to vessels of less than 5 tons burden and vehicles arriving in the United States from contiguous countries, the arrival of which must be *immediately reported* to customs officers, but without the necessity of *making entry* therefor as is done in the case of larger vessels which must be registered or documented under the law. It would be preposterous, however, to contend that such

requirements with respect to report and entry are not applicable to vessels of 5 tons burden or more upon arrival from contiguous countries.

This is only one of the many requirements applicable alike to commerce with contiguous foreign countries and commerce with other foreign countries.

It should be noted, however, that the requirements referred to above relate only to the *report* and the *entry* of vessels, and the *report* of vehicles, and not to the unloading and examination by customs of the imported merchandise on such vessels or vehicles, which is provided for in Sections 447, 448, 449, 450, and 451 of the Tariff Act, the last two of which being the sections in controversy in this case. Another point of importance in this connection is that the several forms of land conveyances enumerated as "carriage," "sleigh," "harness," "cattle," "horses," "cars," and "other vehicles" in Chapter 11, R. S., "Provisions Applying to Commerce with Contiguous Countries," are covered by the one term "Vehicle" in the superseding sections numbers 459 to 465 inclusive of the Tariff Act. In fact the terms "cars," and "railway car" in sections 463 and 465 are used interchangeably with the term "vehicle" in those sections.

It appears, therefore, that the whole attempt in the brief for appellees to set up two separate systems of statutes governing merchandise from contiguous countries as distinguished from merchandise from other foreign countries is based upon a very

specious but fallacious argument. Sections 432 to 458 of the Tariff Act, as referred to in page 22 of the appellees' brief, as being applicable only to merchandise arriving from foreign ports or places other than contiguous countries, are likewise applicable to commerce with contiguous countries when possible of application unless otherwise specifically provided. Sections 459 to 466, referred to on the same page, are particularly applicable to commerce from contiguous countries, but not exclusive of all other provisions of the administrative act. Any other method of interpretation would render nugatory and impossible of enforcement many provisions of our customs laws as applied to commerce with contiguous countries and would confer special favors on Canada and Mexico which would quickly be resented by other countries under the "most favored nation clauses" in their treaties. If Sections 432 to 458 were not intended to be applied to commerce with contiguous countries (which also are as much "foreign places" for customs purposes as are countries in Europe), then it is pertinent to inquire why vessels and vehicles are grouped together in many of these sections when it is a matter of physical impossibility, of which Congress was well aware, for "vehicles" to arrive in the United States from other than contiguous countries.

CONCLUSION

It is respectfully submitted that the court below in entering the decree appealed from was in error, and that such decree should be reversed.

PEYTON GORDON,

United States Attorney.

LEO A. ROVER,

Assistant United States Attorney.

JESSE P. CRAWFORD,

Special Assistant United States Attorney.

APPENDIX

District Court of the United States, Western District of New York. Niagara Ferry & Transportation Company, Inc., Complainant, against Fred A. Bradley, as Collector of Customs for the Ninth Customs District of the United States; John Doe and Richard Roe, whose names are unknown to complainant, said names being fictitious, it being thereby intended to designate the Assistants, Deputies, Agents, Officers, Under Collectors, and Employees of the said Fred A. Bradley, as such collector, and the officers and employees of the Treasury Department of the United States, engaged as such, defendants.

Stanley & Gidley, Buffalo, New York, for Complainant. Leland G. Davis, Assistant United States Attorney, Buffalo, New York, for Defendants.

At final hearing.

HAZEL, *District Judge*: This hearing is before the court on bill of complaint and answer. The bill prays for an order restraining the defendant Bradley, the Collector of Customs for this district, from requiring further compliance with sections 450 and 451 of the Tariff Act of 1922. The plaintiff operates ferryboats (scheduled daily at frequent intervals) across Niagara River from Ferry Street, Buffalo, N. Y., to Fort Erie, Canada, a distance of about one mile. It is a common carrier of passengers, but concededly does not carry merchandise, baggage, or other property for hire.

The question for decision is whether plaintiff comes within section 450 of the present Tariff Act

which substantially provides that no merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another shall be unladen from the carrying vessel or vehicle on Sunday, holiday, or night, unless a special license shall have been granted by the Collector under regulations prescribed by the Secretary of the Treasury; and by section 451 a special license may issue for unloading upon the master or owner of the vessel giving a bond conditioned to pay the compensation and expenses of the customs officials whose services are required in connection with the unloading at night or on Sunday or on a holiday in conformity with section 5 of the Act of February 13, 1911, as amended. Section 5 as amended in 1920, which was adopted by the Tariff Act of 1922, empowers the Secretary of the Treasury to fix a reasonable rate of compensation for overtime services performed by customs employees in the discharge of their duties, including services in receiving and examining passengers' baggage, and section 451 requires payment by the master or owner of the vessel for such overtime service.

Plaintiff herein in July, 1923, complied with the demand of the Collector of Customs by giving the required bond, and received the unloading license. It now prays to be relieved from such payment on the grounds that sections 450 and 451 do not apply to ferryboats in use for carrying passengers and their baggage between this country and a contiguous foreign country. Numerous statutes in force prior to the Tariff Act in question are contained in the brief in support of this point. But it would serve no useful purpose to incorporate in this decision the various

regulations in extenso, or particularize the existing distinctions between vessels carrying merchandise or passengers and their baggage from a foreign country and from contiguous foreign countries, since the various statutes and their application to classes of commerce are comprehensively recited by Mr. Justice Brandeis in *International Railway Co. v. Davidson*, 257 U. S. 506, and in the opinion of Judge Tuttle, including the provisions of the Tariff Act of 1922, in *Port Huron & Sarnia Ferry Co. v. Richard T. Lawson*, 292 Fed. 216—a case substantially similar to this—and wherein it was decided that sections 450 and 451 apply to ferryboats operating regularly between Canada and the United States, and moreover that the owner or agent of vessels may be required to execute a bond on issuance of a license by the Secretary of the Treasury, conditioned for the payment of overtime compensation of customs employees for their work at night, Sundays, or holidays. The instant case does not come within the decision of the Supreme Court in the *Davidson case* or the case subsequently decided by this court in *International Railway Company v. Bradley* (unreported). The *Davidson case* was decided prior to the enactment of the present Tariff Act, and it was then held that the Act of 1911, and amendatory act passed in 1920, were not broad enough to include toll bridges over Niagara River and used by trolley cars in transporting passengers and their baggage. In the *Bradley case* this court held that Congress did not contemplate by the term “carrying vessel or vehicle” used in section 450 of the Tariff Act of 1922, now in force, toll bridges or trolley cars carrying passengers and their baggage from a foreign port or place. Various provisions relating to tariff and transportation of

merchandise and passengers and their baggage were repealed by section 642 and the law relating to regulation of vessels arriving from a foreign port or from a contiguous country, is now included in sections 401 to 465 of the Tariff Act of 1922. From such provisions it is manifest that Congress differentiated between the manner of inspecting vessels carrying cargoes arriving in this country from a foreign port or place and vessels carrying merchandise, passengers, and their baggage.

That plaintiff's ferryboats in question are vessels as that term is defined in the Tariff Act must be conceded, and also that they are common carriers of passengers and their baggage, and hence I think that sections 450 and 451 apply to all vessels of whatever description, including plaintiff's ferryboats which make trips at frequent intervals in the daytime across Niagara River and between a port of the United States and a Canadian port (section 441). Their capacity exceeds five net tons, and section 459, which provides for a different inspection than that required of vessels of greater tonnage, does not apply to them.

In the *Port Huron & Sarnia Ferry Company case*, *supra*, the contention of the plaintiff was substantially the same as here, viz, that there was different regulatory requirements adopted by Congress between vessels carrying merchandise between this country and a foreign country and vessels carrying passengers and their baggage to this country from a contiguous foreign country, but Judge Tuttle, after reviewing the various prior statutes, decided that the contention could not be sustained; and he said that sections 450 and 451 are "plain and unambiguous" and should be interpreted and given effect in accordance with their explicit language; that there existed no vagueness or

uncertainty in section 451 relating to the arrival of merchandise, baggage, or passengers from any foreign port or place and unloading the same on Sunday, holidays, or at night, except under a special license granted by the collector. I think his interpretation as applied to ferryboats is correct, and it applies in this case.

Plaintiff argues that a different rule applies to ferryboats in carrying passengers from a foreign contiguous port to the United States, and draws attention to the decision of this court in *International Railway Company v. Bradley*. In that case, it is true, this court stated that the distinction between arrivals of vessels from a foreign port or place and from foreign contiguous country had long been recognized in the administration of customs laws; that there were different regulations provided for inspection and reports; and that sections 450 and 451 apply to arrivals by sea and not to arrivals of trolley cars from a contiguous country. The question in that case was whether toll bridges and trolley cars crossing over the bridge at Niagara Falls from a contiguous foreign country were included within section 450, and, as heretofore pointed out, it was held that they were not. What was said as to certain provisions applying to arrivals by sea and not from a contiguous country was obiter and unnecessary to the decision. On consideration, therefore, of the pleadings and arguments, I am constrained to rule that the bill is without equity and a final decree dismissing it may be entered.

JOHN R. HAZEL, D. J.

JANUARY 12, 1925.

OCT 14 1925

Henry M. Hodges
CLERK.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1925.

No. 4297

ANDREW W. MELLON, SECRETARY OF THE TREASURY OF
THE UNITED STATES, APPELLANT,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, THE
MICHIGAN CENTRAL RAILROAD COMPANY, VER-
MONT CENTRAL RAILWAY, THE BOSTON AND
MAINE RAILROAD, RUTLAND RAILROAD COM-
PANY, THE DELAWARE AND HUDSON COM-
PANY, GREAT NORTHERN RAILROAD COMPANY,
NORTHERN PACIFIC RAILWAY COMPANY, WA-
BASH RAILWAY COMPANY, SPOKANE INTER-
NATIONAL RAILWAY COMPANY, MINNEAPOLIS,
ST. PAUL & SAULT SAINTE MARIE RAILWAY,
BODIES CORPORATE, APPELLEES.

BRIEF FOR APPELLEES.

GEORGE F. SNYDER,
JULIUS I. PEYSER,
JESSE C. ADKINS,
GEORGE E. EDELIN,
Attorneys for Appellees.

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IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1925.

No. 4297

ANDREW W. MELLON, SECRETARY OF THE TREASURY OF
THE UNITED STATES, APPELLANT,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, THE
MICHIGAN CENTRAL RAILROAD COMPANY, VER-
MONT CENTRAL RAILWAY, THE BOSTON AND
MAINE RAILROAD, RUTLAND RAILROAD COM-
PANY, THE DELAWARE AND HUDSON COM-
PANY, GREAT NORTHERN RAILROAD COMPANY,
NORTHERN PACIFIC RAILWAY COMPANY, WA-
BASH RAILWAY COMPANY, SPOKANE INTER-
NATIONAL RAILWAY COMPANY, MINNEAPOLIS,
ST. PAUL & SAULT SAINTE MARIE RAILWAY,
BODIES CORPORATE, APPELLEES.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

Appellees are railroad companies engaged in commerce
as common carriers in the transportation of merchandise and
freight between points in Canada and the United States,

their railway lines entering the United States from Canada at different points along the international border. The Treasury Department maintains customs inspectors and employees at the points of entry for the purpose of examining the imported merchandise on appellees' trains at the time of entry into the United States. Following the enactment of the Tariff Act of 1922, approved September 21, 1922, the Secretary of the Treasury authorized the customs inspectors, at points of entry, to compel appellees to pay extra compensation for their services in examining merchandise and freight on appellees' trains entering the United States on Sundays and holidays and on week days between 5 o'clock p. m. and 8 o'clock a. m. Appellant has threatened to withdraw the inspection during the times mentioned unless such extra compensation is paid by the appellees.

A bill for injunction was filed and the court below granted the injunction restraining appellant from attempting to collect the extra compensation or to withdraw the service (Rec., p. 10).

THE LAWS INVOLVED.

The laws involved are identically the same as those in *Mellon, appellant, vs. Minneapolis, St. Paul & Saulte St. Marie et al., appellees*, now pending in this court, No. 4273. In the case just mentioned the question is the application of the laws to passengers' baggage on railway trains; the question involved in this appeal is the application of such laws to freight and merchandise on railway trains.

Appellant sets forth verbatim the pertinent sections of the laws in his brief, beginning on page 4 thereof. Briefly, we have for consideration the construction and interpretation of

Sections 450 and 451 of the Tariff Act of 1922, which act cancels the first four sections of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (41 Stat., 402), leaving intact Section 5 thereof.

Appellees contend that the laws involved permit the imposition of extra compensation for the examination of freight or merchandise only on water craft and do not extend to land conveyances—especially railroads. Therefore, the Secretary of the Treasury is without authority in law to compel the payment by appellees of the extra compensation for his employees engaged in the examination of imported merchandise during the times mentioned.

ARGUMENT.

I. HISTORY OF LEGISLATION.

In appellees' brief in *Mellon vs. Minneapolis, St. Paul & Saulte St. Marie Railroad*, No. 3720, which case involved the construction of the Act of February 13, 1911, as amended February 7, 1920, the development of the law on this subject was shown in great detail and the conclusion reached that Congress had reference only to water craft in providing for the payment of extra compensation. (Brief, p. 3, case 3720). In the case at bar, appellant has attempted to take the same acts and show a change in the intention and purpose of Congress. He would have it understood that there has been a gradual expansion in the law from its application to water craft to a control over conveyances of every description including water, land and air. But a glance at appellees' brief in case 3720 and the acts quoted in the appendix thereof shows that the purpose of Congress was only to ex-

tend the operation thereof over water carriers. The language in all of the statutes, beginning with the Act of March 2, 1799 (1 Stat., 655, Section 50), is such as to show that the laws related only to water craft. Such terms as "vessel," "steamship," "lade," "unlading," "cargo," "port," "naval-officer," "master," and "owner" show very clearly that the laws only had application to water craft.

This conclusion has the sanction of judicial determination. This Court, in case No. 3720, *supra*, reported 52 App. D. C., 246, in construing the Act of 1911, as amended in 1920, speaking of the opinion of the Supreme Court in *International Railway Co. vs. Davidson*, 257 U. S., 506, said:

"While the Court grounded its opinion upon the fact that the railway company was not a common carrier belonging to a line designated as a carrier of bonded merchandise, and, therefore, not within the scope of the Act, the opinion went further and held that the examination of passenger's baggage, referred to in the Act, was limited to baggage arriving by vessel or a water craft."

II. THE TARIFF ACT OF 1922 DOES NOT ENLARGE THE SCOPE OF PRIOR LEGISLATION SO AS TO MAKE IT INCLUDE LAND CARRIERS.

A. THE DEFINITION OF THE WORD "VEHICLE" DOES NOT ENLARGE THE OPERATION OF THE LAW.

Section 5 of the Act of February 13, 1911, amended February 7, 1920, has been judicially determined as having reference only to water craft. Sections 450 and 451 of the Tariff Act have only reference to the granting of a special license and the giving of a bond in accordance with Section

5 of the Act of 1911 before any merchandise may be unladen during the period of time mentioned. The particular sections of the Tariff Act of 1922 still adhere, primarily, to the use of terms which are only connected with water craft, such terms being "port," "unladen," "vessel," "master," "owner," and "agent." Therefore Section 401, paragraph B, of the Tariff Act, which defines the word "vehicle" to include "every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air," amounts, so far as the law requiring payment of extra compensation is concerned, to surplusage or ambiguity. Or, at the most, it amounts to a very limited broadening of the Act.

"The word 'vehicle,' it is true, was an enlargement of the House bill of the word 'vessel,' but it was to include arrivals by sea of hydroplanes or other air craft arriving from a foreign port or place." *International Ry. Co. vs. Bradley*, not reported. See Appendix.

B. THE HISTORY OF THE STATUTE DOES NOT SHOW THAT IT WAS INTENDED TO COVER FREIGHT BY RAILROAD COMPANIES, AND THE DEPARTMENTAL PRACTICE (EXCEPT IN ONE STATE) WAS NOT TO COLLECT THE COMPENSATION.

Appellant's contention as to departmental practice is not supported by evidence and is contrary to the pleadings and to statements in his own brief.

Appellant relies largely upon the Act of June 30, 1906, amending Section 2871 R. S. U. S., and also upon the Act of February 13, 1911, as amended in 1920.

The Act of 1913 expressly repeals the Act of 1906, and the Act of 1911 as amended in 1920 has been held both by this Court and the United States Supreme Court to apply only to water carriers.

The pleadings show that prior to 1920 the Treasury Department attempted to collect extra compensation for freight in only one of the six States mentioned in the petition, and made no attempt in the other five States. The petition mentions railroads crossing the border in the States of Vermont, New York, Michigan, Minnesota, North Dakota and Washington.

Paragraph 4 of the petition as amended (Rec., pp. 4 and 7) states that the United States itself paid the customs employees and inspectors for their services in examining the freight at the points mentioned in the petition, and prior to 1920 made no effort to collect any part thereof from the railroads or shippers or consignees.

Appellant admits all averments of paragraph 4 not denied. He denies only this allegation so far as it relates to the points in Washington State and alleges that at those points the extra compensation was collected.

Thus, in five out of six States involved, the Secretary made no effort to collect the compensation. Thus the departmental practice (except in one State) was directly opposed to the appellant's theory and counsel so admit.

On page 27 of appellant's brief, it is stated that prior to the Tariff Act of 1922, the Treasury Department maintained customs inspectors to render overtime services without compensation, in order to permit trains to enter at night, while similar services in connection with vessels were being paid for. He argues that Sections 450 and 451 of the Tariff

Act of 1922 were passed to remedy this unjust and inequitable condition.

Notwithstanding this frank admission of the practice up to the passage of the Tariff Act, appellant relies on certain decisions of his own or his assistants dated November 22, 1922, and March 7, 1923, expressing his present construction of the law and argues that this constitutes a practice which should be followed by this Court (Brief, p. 29).

There were decisions of the Secretary leading to the present litigation. The railroad companies quite properly attempted to show the Secretary that the law did not authorize collection of the extra compensation from them. And when he finally insisted on the contrary view, this suit was promptly filed.

Appellant is relying upon the rule that where an ambiguous statute has long been construed in a certain way by the Department charged with its enforcement, that construction will not be upset unless it is clearly wrong.

If the rule be carried to the extent contended for the executive departments would usurp the judicial function. Usually a Federal statute is first construed by some branch of the Executive Department.

Clearly the rule is inapplicable here. The statute is not ambiguous; the construction is of very short duration, and it is violation of the statute.

Nor is the Tariff Act remedial legislation in any sense. The courts are not called upon in order to remedy a wrong to distort its language. The only question is whether Government employees shall be paid extra compensation.

They had not been paid that compensation prior to 1922. If they were dissatisfied with their situation, they could seek

other employment. If the Treasury Department was dissatisfied, it could procure legislation authorizing the Government to pay extra compensation, or legislation which would in clear language attempt to impose that burden upon the carriers.

When such legislation is adopted, its validity can be questioned, but until that time the courts will not do violence to the language of a statute and attempt to tax the property of railroad companies for the purpose of paying a bonus to a certain class of Government employees.

C. THE COLLECTION OF EXTRA COMPENSATION IS A TAX AND THE CONGRESSIONAL AUTHORITY THEREFOR MUST BE CLEAR.

We have demonstrated hereinbefore that the history of the laws involved shows them to have had reference only to water craft. The Tariff Act of 1922 does not with any degree of clarity enlarge the scope of the laws. The use of the word "vehicle" and the congressional definition of that word, as before shown, serves only to render that part of the Tariff Act ambiguous. In *International Railway Company vs. Davidson*, 257 U. S. 512, *ante*, the Supreme Court said:

"To collect the cost of customs service from vessel owners or others is virtually laying a tax upon them. This cannot be done except by specific authorization of Congress."

This Court in *Mellon vs. Minneapolis, St. P. & S. S. M. Ry. Co.*, 52 App. D. C. 246, *ante*, said:

"The imposition of a tax is involved, which can only be accomplished by express authority at law."

District Judge Hazel in the case of *International Railway Company vs. Bradley*, decided in the District Court of the United States, Western District of New York, *ante*, which case, by the way, involves the construction of Sections 450 and 451 of the Tariff Act of 1922, states:

"The definition in terms includes 'every description of carriage or other contrivance used or capable of being used as a means of transportation on land or through the air.' Notwithstanding this broad definition it is necessary to ascertain from the action of the committee of both Houses as to the legislative intention. To require payment by plaintiff of extra compensation for work on Sundays and holidays would be in the nature of a tax and hence the rule obtains that a tax provision does not accomplish any purpose other than that specifically mentioned."

In addition to the lack of definiteness in the statute, the proposed enforcement thereof would not be uniform. At some border points the Treasury Department maintains 24-hour service and makes no attempt to tax the railroads with the cost of examining merchandise at night or Sundays or on holidays. Thus there is a possibility of a construction which would enforce the tax against some railroads and at the same time relieve others therefrom.

D. SECTION FIVE OF THE ACT OF 1911 AS AMENDED IN 1920 IS STILL LIMITED TO THE JUDICIAL CONSTRUCTION THEREOF.

At the time of the enactment of the Tariff Act of 1922, Section 5 had been judicially construed by the Supreme Court of the United States and the Court of Appeals of the District

of Columbia. The Supreme Court, in *International Railway Co. vs. Davidson*, *ante*, stated that Section 5 "is given full effect if applied to the baggage of passengers on those vessels for the immediate lading and unlading of whose cargos special license may issue under the first four sections of the Act of 1911." The four sections referred to have been repealed by the Tariff Act of 1922.

This Court stated that the Act "was limited to baggage arriving by vessel or water craft" (52 App. 249).

Congress certainly knew of this judicial construction and, in leaving Section 5 intact, it is presumed to have adopted those constructions. The principle is analogous to that which holds that when a law is adopted from a foreign jurisdiction the settled construction of that law is a part thereof (*Robinson Co. vs. Belt*, 187 U. S. 41, 47). Appellant devotes pages 29 to 33 of his brief to the executive construction given to the law. Whatever consideration may be ordinarily given to such construction, it can never compete with a judicial construction, especially when that judicial construction is by the highest court of the land. While it is true that the executive construction referred to by appellant pertains to Sections 450 and 451 of the Tariff Act, nevertheless Section 5 of the Act of 1911, as amended, is the only law on the statute books relative to imposition of extra compensation and is limited to the judicial construction referred to. As before stated, Sections 450 and 451 of the Tariff Act have reference only to the granting of special license and the giving of bond and do not provide for the collection of the extra compensation.

E. SECTION FIVE OF THE ACT OF 1911 AS AMENDED IS STILL THE ONLY LAW PROVIDING FOR THE PAYMENT OF EXTRA COMPENSATION.

As before stated, Sections 450 and 451 of the Tariff Act provide only for the granting of a special license to unlade and the giving of a bond to indemnify the United States "for any loss or liability which may occur" by reason of such special license "and to pay the compensation and expenses of custom officers and employees whose services are required in connection with such unlading at night, or on a Sunday or a holiday, in accordance with the provisions of Section 5" of the Act of 1911 as amended. Appellant contends that the foregoing reference in the Tariff Act, to section 5 amounts to a reenactment of said section and that it must now be construed as though it had been amended in terms to apply to land carriers, especially railroads. But surely had Congress had any such intention it would have rewritten Section 5 in such a fashion as to leave no doubt that it was meant to cover land carriers, by the use of specific terms and language sufficient to definitely cover such a situation. Having left the section intact, without even the change of a word, it is presumed that Congress did not wish to change the judicial construction theretofore given to it.

Appellant states, on page 19 of his brief that "If compensation for overtime service can be collected only from carriers by water, then carriers by land would be required to give a bond containing two conditions, one of which would have no application to them." He further states that the giving of this bond by land carriers would be absurd if they are not to pay the compensation. Section 451 of the Tariff Act, however, requires the giving of a bond by all carriers.

The purpose of the bond is twofold. It is to indemnify the United States for any loss or liability which may occur by reason of the granting of special license (this having application to all carriers) secure the payment of the extra compensation by the particular class of carriers who are required so to do by law (this having reference to water carriers). As stated before, Section 5 is the only law which provides for the payment of extra compensation and it has been decided by the courts that only water carriers are required to pay this compensation. There is nothing absurd in having a general form of bond to be given by all carriers, the first requirement of which is to prevent a loss by non-payment of duties and is applicable to all carriers, and the second provision of which has reference to the payment of extra compensation and has reference to only water craft. The fact that one condition of the bond does not apply to certain carriers does not make the general bond for all purposes an absurdity. As before stated, twenty-four hour service is maintained at some points on the international border and no extra compensation is required of the carriers for the examination of merchandise carried by them. Nevertheless these carriers are required to give the general bond, as provided in section 451, the same as all other carriers. Appellant has not said that there is anything absurd in this. Appellant argues that the reason and purpose of the law is to place vessels and freight cars on the same basis with respect to lading and unlading at night and to remove the source of contention and dissatisfaction growing out of the payment of extra compensation to customs inspectors working on water craft and the failure to pay such extra compensation to inspectors working on freight trains. There is, however, no support for his argument. All through the enactment of the various

laws leading up to the Tariff Act of 1922 the committee reports and floor debates in both houses of Congress show that the only object of Congress was to provide for the payment of extra compensation to those inspectors working on water craft. Mr. Justice Brandeis quotes the statement of Senator Calder in the *International Railway Company* case, 250 U. S. 530. In appellee's brief, pages 7 to 15, in case No. 3720, *ante*, reported in 52 App. D. C., 246, Congressional debates and committee reports are quoted at great length, and in no place is there the slightest indication that Congress had any intention whatever to enforce the payment of extra compensation by railroads.

Nowhere is there the slightest suggestion that Sections 450 and 451 of the Tariff Act are intended to change the operation of the law or to remove any inequality among customs employees.

If Congress had any intention to enlarge the scope of Section 5 of the Act of 1911 by the Tariff Act of 1922, it certainly seems logical that there would be somewhere in the committee reports or in the Congressional debates something to indicate such an intention. Inasmuch as there was nothing to indicate an intention to enlarge the operation of the Act, it can be safely presumed that Congress had the express purpose of maintaining the then existing scope and operation of the Act as indicated by previous committee reports, Congressional debates and judicial construction.

F. THE TARIFF ACT OF 1922 CODIFIED AND RESTATED, BUT
DID NOT CHANGE, EXISTING LAW.

District Judge Hazel, in *International Railway Co. vs. Bradley*, *ante*, stated:

"The discussions in committee made no reference to the Davidson case or to the case of Mellon *vs.* Minneapolis, St. P. & S. S. M. Ry. Co., 285 Fed. 982, which had decided prior to the Tariff Act of 1922 that the Act of 1920, amending the Act of 1911 did not apply to railroad trains arriving from a contiguous country. The purpose of the enactments was, I think, to revise and codify the administrative provisions specifically relating to custom laws, without intending to give them such broadening effect as to include arrivals by trains or cars from an adjacent country."

The fact that the enactment of Sections 450 and 451 was for the purpose of codifying the law relating to customs administration or merely restating the law as it then existed finds full and complete support in the excerpts from the reports of the House managers, set forth at some length on pages 19, 20 and 21 of appellees' brief in case No. 4273, now pending in this Court. The excerpts are not again quoted, but by referring to them in the brief mentioned it will be seen that undeniably the purpose was not to change the existing law. Especial attention is called to the excerpts from page 13,682, quoted on page 20 of appellees' brief in case 4273, wherein it is stated "the Senate amendment strikes out this revision and *restores existing law.*"

As said by Judge Hazel in *International Railway vs. Bradley, ante*, if Congress had intended to include trolley cars (or to enlarge the scope of the operation of the act) it no doubt would, in view of the Davidson case, have used clear and definite language to express its intention.

G. THE TARIFF ACT PRESERVES THE DISTINCTION BETWEEN COMMERCE WITH CONTIGUOUS COUNTRIES AND THAT WITH OTHER FOREIGN COUNTRIES.

Section 459 of the Tariff Act of 1922 after it left the House of Representatives read as follows:

“SECTION 459. Imports from contiguous countries: Of vessels or vehicles or merchandise imported therein arriving in the United States from a contiguous country, shall be subject to all the provisions of law relating to vessels and the merchandise imported therein from other countries by sea unless otherwise provided by law or by regulations prescribed by the Secretary of the Treasury.”

This section was stricken out, thus indicating an intention to preserve the distinction. See *International Railway Company vs. Bradley*, appendix hereto.

Mr. Justice Brandeis refers to the two distinct systems for the examination of articles arriving from foreign countries in his opinion in *International Railway Company vs. Davidson*, 250 U. S. 513.

Part 2 of title 4, the administrative provisions of the Tariff Act, contains the statutes relating to the two systems and shows clearly that the distinction has been preserved.

Sections 432 to 458 of the Tariff Act apply to the system in reference to foreign ports or places. Commerce with contiguous countries is provided for in Sections 459 to 466.

A comparison of the different sections has been called to the attention of this Court at length in appellees' brief in case No. 4273, *Mellon vs. Minneapolis St. P. & S. S. M. Ry. Co.* This comparison shows the distinction to be preserved.

III. THE REQUIREMENT FOR PAYMENT OF EXTRA COMPENSATION IS A TAX FOR THE PURPOSE OF GIVING A BONUS TO GOVERNMENT EMPLOYEES, AND, THEREFORE, UNCONSTITUTIONAL.

A. THE IMPOSITION OF THE TAX IS THE TAKING OF PRIVATE PROPERTY FOR A PRIVATE PURPOSE WITHOUT JUST COMPENSATION.

Section 2733, Revised Statutes, fixed the salary of customs inspectors at the rate of \$3.00 per day. This was increased not to exceed \$6.00 per day by the Act of March 4, 1909, 35 Stat. 1065.

Section 1790 forbids a customs employee to receive compensation from an importer, and by the Act of March 3, 1917, 39 Stat. 1106, this provision was applied to all officials and employees of the United States and not only forbids them to receive compensation from others, but also forbids others from making contributions to a Government official or employee for services performed for the Government of the United States.

The pertinent parts of the foregoing statutes are copied in the Appendix, page 31, of appellee's brief in case 4273.

The word "day" as used in Section 2733, Revised Statutes, meant a calendar day. *United States vs. Garlinger*, 169 U. S. 316.

The Government employees referred to in Section 5 of the Act of 1911 are employed by the day and are paid a daily wage for their services, regardless of the number of hours devoted during a calendar day to their labor. They can only receive the statutory compensation.

The requirement that the importer pay extra compensation or a bonus to the Government employees for performing his duty after he has already been paid by the United States is a taking of private property for private purposes without just compensation.

“Moreover, unless so authorized no official or employee may receive from the government pay for extra services. Revised Statutes §1764, Comp. Stat. §3233, 8 Fed. Stat. Anno. 2d ed., p. 932; *United States v. Garlinger*, 169 U. S. 316, 42 L. Ed. 762, 19 Sup. Ct. Rep. 364. Nor may he receive, in connection with his services, pay from any private source, Act of March 3, 1917, chap. 163, §1, 39 Stat. at L. 1106 Comp. Stat. §3231 a. Customs officials especially are forbidden to receive such payment. Revised Statutes §1790, Comp. Stat. §3625, 8 Fed. Stat. Anno. 2d Ed., p. 946.”

International Railway Co. vs. Davidson, 257 U. S. 513.

It is fundamental that a tax may be imposed only for public purpose. See Gray's Limitation of Taxing Power, Sections 169-170:

“The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise of either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the

legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

Cole vs. La Grange, 113 U. S. 1,

See also

Miles Planting Co. vs. Carlisle, 5 App. D. C. 138.

Baltimore & Eastern Shore R. R. Co. vs. Spring, 80 Md. 510.

B. THE REQUIREMENT THAT THE SMALLER ROADS PAY THE EXTRA COMPENSATION FOR SERVICE WHICH IS FURNISHED FREE TO THE LARGER RAILROADS IS A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

At some points on the international border the Government maintains a 24-hour inspection service and does not require the payment of extra compensation. (See appellant's brief, page 21, case 4273.) Thus it will be observed that there is a discrimination between the larger and the smaller railroads. This discrimination renders the statute invalid.

The 5th Amendment provides that no person shall "be deprived of life, liberty or property without due process of law".

The 14th Amendment applies this provision to the States and also provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

There is no substantial difference between the requirements of due process of law contained in the Fifth and in the Fourteenth Amendments (*Carroll vs. Greenwich Insurance Co.*, 199 U. S. 401, 410; *Twining vs. New Jersey*, 211 U. S. 78, 101).

They are alike in terms and alike in meaning. The provision for the equal protection of the law of the Fourteenth

Amendment, no doubt, emphasizes the necessity for proper classification in State taxation, but it does not create this requirement. The due-process clause alone would be equally effective for this purpose (McGeehee's Due Process of Law, pp. 60-64, 311). Indeed nothing could be deemed a more inherent requirement of due process of law in taxation than equality among the same class under like conditions.

In *Southern Railway Co. vs. Green*, 216 U. S. 400, 417, Alabama imposed a tax upon non-resident railroads doing business therein, but did not impose that tax upon railroad corporations of the State doing the same character of business. It was held that this was an arbitrary and fanciful distinction and was a denial of the equal protection of the laws.

So in the present case the attempt to impose a tax on the small railroads alone is a violation of due process, and, therefore, invalid.

It is, therefore, respectfully submitted that the decrees appealed from are correct and should be sustained.

GEORGE F. SNYDER,

JULIUS I. PEYSER,

JESSE C. ADKINS,

GEORGE E. EDELIN,

Attorneys for Appellees.

APPENDIX.**DISTRICT COURT OF THE UNITED STATES,
WESTERN DISTRICT OF NEW YORK.****INTERNATIONAL RAILWAY COMPANY***vs.***FRED A. BRADLEY, as Collector of Customs of the Ninth
Customs District of the U. S., etc., et al.****Action for Injunction.**

Cohn, Chormann & Franchot (Basil Robillard, Esq., of counsel), Niagara Falls, N. Y., for plaintiff.

William J. Donovan, U. S. attorney, Buffalo, for defendant.

HAZEL, District Judge:

The sole question involved herein, as appears by the pleadings and supporting affidavits upon which the case was heard, is whether the Tariff Act of 1922, Secs. 450-451, changed or modified the Act of 1920, amending Sec. 5 of the Act of February 13, 1911, so as to require plaintiff, as licensee, to pay customs officials for their work on Sundays and holidays at the International toll bridge extending across Niagara River at Niagara Falls, New York, in the operation of trolley cars carrying passengers from Canada across the toll bridge. In *International Ry. Co. vs. Davidson*, 257 U. S. 506, the Supreme Court decided that the Act of 1911-1920, authorizing special permits for lading and unlading of vessels and other conveyances, and empowering the Secretary of the Treasury to fix compensation of officials for their work on Sundays and holidays, to be paid by the licensee, did not apply to plaintiff nor to the operation of its passenger trolley line of cars; and that the amendment relating to overtime work by cus-

toms officials and payment of extra compensation in connection with lading or unlading of cargo or examination of passengers' baggage did not apply to arrivals from Canada on plaintiff's trolley cars. Prior to 1911 vessels arriving at a port of entry would not be unloaded until daytime because of the absence of customs inspectors. The Act of Feb. 3, 1911, authorized lading or unlading cargo at night but required special license so to do from the Secretary of the Treasury, and a bond holding the United States harmless from losses and liabilities on account thereof. The Secretary of the Treasury was authorized to fix a reasonable rate of extra compensation for night work to inspectors "in connection with the lading or unlading of the cargo at night," to be paid by the licensee. There was no mention of passengers' baggage or payment to the examining inspector for overtime work on Sundays and holidays. In the year 1920, however, extra compensation for performing services in connection with lading or unlading the cargo or examining passengers' baggage was included but the provisions were apparently limited to cargo-carrying vessels to the exclusion of vessels transporting passengers. They were enacted presumably because of the pecuniary benefits derived by vessels arriving from foreign ports and places to whom inspection and unloading at night, Sundays and holidays was a saving of time and expense, and for this reason no doubt payment by them to customs inspectors for overtime work was required. No such benefits and advantages are obtained by plaintiff in the operation of its trolley cars, no merchandise being brought in by them, and the examination of passengers and their baggage being in the main simply a governmental service.

The Supreme Court, in the Davidson case, decided that the statutory requirement of "entry of vessels and due report of other conveyances" did not disclose an intention to make it applicable either to toll bridges or the running thereon of a line of passenger trolley cars. The learned court proceeded to say that Congress had created two distinct systems for the

examination of articles coming from foreign countries; one dealing with merchandise, and the other with passengers' baggage and personal effects; that Secs. 2799 to 2802, inclusive, deal with articles from foreign ports and places while other provisions dealt with articles coming from contiguous countries.

The Tariff Act of 1922, providing for the issuance of a special license, reads as follows:

"SEC. 451. Same—Bond.—Before any such special merchandise, baggage or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe.

"SEC. 45. Same—Bond.—Before any such special license to unlade shall be granted, the master, owner, or agent of such vessel or vehicle shall be required to give a bond in a penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees whose services are required in connection with such unlading at night or on Sundays or a holiday in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels and for other purposes,' approved February 13, 1911, as amended. In lieu of such bond the owner, or agent of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special

licenses for the unloading of vessels or vehicles belonging to such line for a period of one year from the date thereof."

The scope of these sections in my opinion does not include the arrival of baggage or passengers on trolley cars from a contiguous country. There is no perceivable intention in the language employed to change or modify the existing law, unless the definition of the word "vehicle" (Sec. 401) imparts a broadening effect and one that will include trolley cars arriving from a contiguous country." The definition in terms includes "every description of carriage or other contrivance used, or capable of being used as a means of transportation on land or through the air." Notwithstanding this broad definition it is necessary to ascertain from the action of the committee of both Houses as to the legislative intention. To require payment by plaintiff of extra compensation for work on Sundays and holidays would be in the nature of a tax, and hence the rule obtains that a taxing provision does not accomplish any purpose other than that specifically mentioned. The discussions in committee made no reference to the Davidson case or to the case of *Mellon vs. M. St. P. and S. Rd.*, 285 Fed. 982, which had decided prior to the Tariff Act of 1922 that the Act of 1920, amending the Act of 1911, did not apply to railroad trains arriving from a contiguous country. The purpose of the enactments was, I think, to revise and codify the administrative provisions specifically relating to customs laws, without intending to give them such broadening effect as to include arrivals by trains or cars from an adjacent country. The word "vehicle," it is true, was an enlargement of the House bill of the word "vessel," but it was used to include arrivals by sea of hydroplanes or other aircraft arriving from a foreign port or place. If Congress had intended to include trolley cars it no doubt would, in view of the Davidson case, have used clear and definite language to express its intention. The distinction between arrivals of vessels from a foreign port or place and from foreign con-

iguous country has long been recognized in the administration of customs law. Different manifests, entries, reports, licenses and penalties apply to the different systems. The difference between Secs. 433 and 459, which provide for reports of arrivals, is marked. The first applies to arrival of a vessel from any foreign port or place which is allowed 24 hours to make report of her arrival to the customs officer, while Sec. 459 relating to arrivals from a contiguous country requires making an immediate report to him on entry. Other provisions bearing upon this point make it clear that these two systems of collecting customs are governed and controlled by different statutory provisions. The adjudications and arguments advanced by the Government in opposition to this view have been examined by me but I am nevertheless persuaded that Secs. 450-451 under consideration merely apply to arrivals by sea and not to arrivals of trolley cars from a contiguous country. This conclusion is supported I think by Senate document No. 187 which contained an amendment to the effect that all vessels or vehicles or merchandise imported therein coming into the United States from a contiguous country should be subject to the same provisions of law relating to arrivals by sea but this proposed amendment was not accepted by the Senate and the House receded.

My conclusion is that the Tariff Act in question has not so modified or changed the prior act as to include a requirement that plaintiff give a bond as a condition of obtaining a special license to discharge its passengers and their baggage on Sundays, holidays or at night.

Under the stipulation of the parties a final decree for permanent injunction may be entered as prayed without further proof.

JOHN R. HAZEL, *D. J.*

Dated December 20, 1923.

